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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM L. BURTON, et al.,
Appellants,

vs.

WALKER HOBBIE, JR., etc., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
(three-judge court)

JURISDICTIONAL STATEMENT

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WILLIAM L. BURTON, PERCY D. BELL, ABRAHAM LINCOLN WOODS, JR., BOBBY JO JOHNSON, ANDREW HAYDEN, FELIX NIXON, EURALEE A. HAYNES, individually and on behalf of all other persons similarly situated,

Appellants,

vs.

WALKER HOBBIE, JR., in his official capacity as Judge of Probate Of Montgomery County and as a representative of the class of all judges of probate in the State of Alabama; DON SIEGELMAN, in his official capacity as Secretary of State of Alabama; CHARLES A. GRADDICK, Attorney General for the State of Alabama,

Appellees.

QUESTIONS PRESENTED

1. May a district court hearing a challenge to a legislative reapportionment plan implement an act of the state legislature which has been submitted to the Attorney General under Section 5 of the Voting Rights Act and to which the Attorney General has objected?

2. Should this Court resolve the split of authority existing between the decision below and *Busbee v Smith,* CA 82-0665, U.S.D.C. for DC, 24 May 1982?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court's decision and order are attached as Appendix A and its denial of the motion for reconsideration is attached as Appendix B. The 10 August order denying reconsideration after the Attorney General had formally objected to the State's plan is in Appendix C. Neither order has been officially reported.

JURISDICTION

This is an action under the Voting Rights Act, 42 USC §1971 *et seq.*, and 42 USC §1983 to enjoin a legislative apportionment plan adopted by the Alabama Legislature.

The District Court's decision and order were entered on 21 June 1982, Appendix A. The Court denied a motion for reconsideration on 28 June 1982, Appendix B. The Court again denied reconsideration on 10 August, Appendix C. Appellants filed their notices of appeal to this Court on 1 July and 12 August 1982, Appendices D and E. This Court has jurisdiction of this appeal pursuant to 28 USC §1253. *Upham v Seamon*, ___ US ___, 102 SCt 1518, 71 LEd2d 725 (1982); *Connor v Finch*, 431 US 407 (1977); *Connor v Waller*, 421 US 656 (1975); *Taylor v McKeithen*, 407 US 191 (1972); *Connor v Johnson*, 402 US 690 (1971).

STATUTE INVOLVED

Appendix I contains the text of Section 5 of the Voting Rights Act of 1965, as amended.

STATEMENT OF THE CASE

For the third successive decade, a federal court suit has been filed because the Alabama Legislature has refused to follow either the Alabama or Federal Constitution or both in apportioning its members. See *Reynolds v Sims*, 377 US 533 (1964); *Sims v Amos*, 336 FSupp 924 (MD Ala 1972) (three-judge court). In 1981 the Alabama Legislature adopted an apportionnment act, Act 81-1049, which preserved all incumbent members except four in individual districts.[1] White incumbents were uniformly placed in districts with less than 65% black population — the level below which the Justice Depart-

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[1]One pair of incumbents was black, the other pair white. The black pair were purposefully placed in the same district in central Birmingham so that a new seat in north Shelby County (Birmingham suburban area) with an overwhelming white majority could be created. The white legislators were inadvertently placed together: one of them lives on the road which forms the boundary between two districts. He and the other legislators were apparently unaware of this because the plans were drafted in terms of Census districts, tracts, blocks, etc.

ment and many knowledgeable observers hold that a black candidate cannot actually win an election.[2]

The Attorney General interposed a timely objection to Act 81-1049 on 6 May 1982. The delay of six and one-half months between the passage of the act and the Attorney General's objection was due to delays by the State.[3] In contrast to the slowness of the State, the plaintiffs have always moved with dispatch to request relief from the Court: they filed their complaint a few days after the passage of Act 81-1049; and upon the Attorney General's objection, they amended the complaint to take note of this fact, to allege that the 1972 court-ordered apportionment was now outside the permissable limits of a valid one person-one vote plan,[4] and to ask for an emergency preliminary injunction.

Rather than grant the plaintiff's motion for an interim plan at that time, on 21 May the three-judge District Court established a timetable for the State to obtain passage and preclearance of a new apportionment act and for the plaintiffs to file any proposed plans with the Court. The plaintiffs filed their proposed Plans A and B with the Court.

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[2]Cf, *United Jewish Organizations v Carey*, 430 US 144 (1977) (Attorney General used 65% minority population as benchmark).

[3]As District Judge Myron Thompson noted in his dissent (Appendix A, A-16):

> Nevertheless, even though the legislature was aware that the population variances in its current districting plan for both the House and the Senate exceeded what was allowed under the Fourteenth Amendment and further that any new reapportionment plan would have to be preclared by the Attorney General pursuant to Section 5, it was not until October 21, 1981, less than eight months before the machinery for the 1982 elections was to move into gear with the qualifications of persons as candidates, that the Alabama legislature passed a new reapportionment plan for the 1982 elections, Act No. 81-1049; it was not until January 1982, almost three months after the plan was passed and less than six months before the election process was to begin, that the plan was submitted to the U. S. Attorney General for preclearance pursuant to Section 5; and it was not until April 1982, less than two months before the election process was to begin, that the submission was deemed "complete" by the Attorney General.

[4]All parties have now so stipulated. Appendix A, at A-8.

The State Legislature did pass an act of apportionment (Act 82-629) despite a warning by the Attorney General that he had doubts about the validity of the proposed act. See Appendix F. When the Act was submitted to the Attorney General, he replied on 8 June that he was "unable to conclude on the basis of the State's explanation of these matters that the burden under Section 5 has yet been met respecting the House and Senate districts" (one Jefferson County district and six districts in the western Black Belt). See Appendix G. The districts to which the Attorney General referred were exactly those which he had mentioned in his letter of 25 May.

Th District Court heard oral argument (but no testimony) and then requested the parties to submit proposed modifications to Act 82-629 to meet the Attorney General's concerns about the seven districts. Each side did so but emphasized its preference for its own plan: the Act or plan B.[5] The proposed modifications filed by the State actually reduced the likelihood of the election of a black in the Black Belt, while the plaintiffs' modification (Plan C) "rippled" into twenty-six other counties.[6]

The District Court adopted the plaintiffs' proposed modification in Jefferson County by rearranging the boundaries of the district to which the Attorney General had interposed an objection and to two adjacent districts. With regard to the Black Belt, the Court used the Act 82-629 districts for the following reasons (Appendix A, A-8):

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[5]The defendant-appellees refused to submit a modified plan for the Jefferson County district, on the grounds that they would have to change unobjected-to districts. They never explained to the District Court how a change would be made in the composition of only one district without changing others.

[6]At that time both parties agreed that an extensive "ripple" effect would probably be necessary to satisfy the concerns of the Attorney General about the Black Belt. As it turned out, this was incorrect. A plan affecting fewer districts was possible: Plantiffs' Plan D had a far less extensive effect outside the objectionable six districts than had been predicted by both parties.

(1) The Attorney General had not interposed an objection to Act 82-629.[7]

(2) The Court had the choice between "the legislative plan which has been evolving over months or plaintiffs' Plan B which has not been adequately studied or evaluated other than by plaintiffs."[8]

(3) There are as many safe districts for blacks under Act 82-629 as under the 1972 court-ordered plan.[9]

After the Court issued its opinion, the plaintiffs requested the Court to alter or amend its order with respect to the Black Belt districts. With the motion, the plaintiffs presented Plan D which rippled into only five districts other than the objected-to six Black Belt districts.[10] The plan rearranged counties in such a way that most of them were not split or used existing precinct lines. The District Court denied the motion, Appendix B. With the case in this posture, a motion to stay the interim plan was denied by Justice Rehnquist on 6 July 1982 and by Justice White on 9 July 1982.

The instant appeal addresses the District Court's more recent refusal to modify its interim plan even though that plan utilized the six Black Belt House Districts and corresponding Senate Districts to which the Attorney General entered a formal

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[7]The Attorney General's sixty-day consideration period was far from over at that time.

[8]Plan B was unsuccessfully introduced in the special session of the Legislature as a substitute for the bill which became Act 82-629.

[9]The legislature had continued, for the most part, the same policy it had used in Act 81-1049: preserving nearly all incumbents and keeping their districts "safe" for members of their respective race. There were only two legislators paired in the same district, both white. They were paired because of the relative loss of population in Jefferson County: the Justice Department had objected to pairing blacks in Jefferson County, since it would be regressive. Only one white legislator was given a district with more than 65% black population. This had the effect of placing a "cap" on the number of effective black-majority districts. See text at note 2, *supra*.

[10]Plaintiffs and their counsel had been unaware of the possibility of Plan D until after the District Court's order of 21 June. Since the State had also not proposed this particular configuration, we must presume that they were not aware of this possibility.

objection on 2 August 1982. On 10 August 1982, the three-judge Court denied plaintiffs' motion to amend the interim plan in light of the Attorney General's Section 5 objection. The District Court gave the Legislature until 1 February 1983, to adopt and to obtain preclearance of a new reapportionment plan, Appendix J, but it authorized the use of the objected-to Black Belt districts in the forthcoming 1982 election and did not specify when a special election thereafter would be ordered. Appendix K. The defendants have now filed a motion with the District Court asking for an even greater time period (four months – until 1 June 1983) in which to complete passage and Section 5 submission of a third reapportionment act. Appendix L.

THE QUESTIONS ARE SUBSTANTIAL

I. This Court has Jurisdiction and Authority to Grant Relief Without Plenary Consideration.

Political party primaries are scheduled for 7 September and the general election is set for 2 November. If no action is taken by the Court to delay the general election for legislators, elections will be held under a legislatively enacted plan to which the Attorney General has objected under Section 5 of the Voting Rights Act.

Appellants ask that the Court summarily vacate the decision of the District Court and remand for the adoption of another interim or permanent plan which does not violate Section 5.

In prior cases, the Court has granted interim relief – prior to plenary consideration – to vacate orders of lower courts implementing court-ordered plans which fail to secure the constitutional and statutory rights of minority voters. In *Conner v Johnson*, 402 US 690 (1971), on an application for a stay, this Court stayed the District Court's order implementing a multi-member legislative district which submerged the voting strength of black voters, and remanded the case to the District court to devise a single-member district plan. Similarly, in *Taylor v McKeithen*, 407 US 191 (1971), on a petition for a

writ of certiorari, this Court summarily vacated the decision of the Court of Appeals adopting an alternative plan which the District Court held diluted black voting strength.

In *Conner v Waller*, 421 US 6 56(1975), prior to plenary consideration and on the jurisdictional statement, the Court reversed the District Court's judgment approving a redistricting plan in violation of the guarantees of the Voting Rights Act. In *Conner v Finch*, 431 US 407 (1977), this Court granted an expedited appeal from a judgment implementing a court-ordered plan, reversed, and gave specific guidance to the District Court to avoid the dilution of black voting strength and to "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges," 431 US at 425.

On the basis of these precedents, this Court has full authority to grant the relief requested in this application.

II. The District Court's Order Violates Section 5 of the Voting Rights Act.

The principal reason for appealing is to contest the unprecedented ruling below that a voting procedure to which the Attorney General has objected pursuant to §5 may nonetheless be used for future elections, in the complete absence of any exigent circumstances.

This Court has consistently held that changes in voting required to be pre-cleared may not be implmented in future

[11] *Allen v State Board of Elections*, 393 US 544, 572 (1969) ("All four cases are remanded to the District Court with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with §5."); *Perkins v Matthews*, 400 US 379, 397 (1971) ("the case is remanded to that [district] court with instructions to issue injunctions restraining the further enforcement of the changes until such time as the appellees adequately demonstrate compliance with §5."); *Georgia v United States*, 411 US 526, 541 (1973) ("The case is remanded to the District Court with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State, pursuant to §5 of the Voting Rights Act, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia."); *Dougherty County, Georgia, Board of Education v White*, 439 US 32, 36 (1978) (affirming the district court's

elections absent §5 compliance.[11] Despite this line of cases, the District Court in this case chose to implement the change to which the Attorney General had indicated his preliminary objection.

In his letters dated 8 June and 2 August 1982, the U.S. Attorney General informed the Alabama Attorney General and the District Court that the State has failed to satisfy its burden under Section 5 of the Voting Rights Act, 42 USC §1973c, with respect to the Black Belt House Districts 83, 85, 86, 87, 88, and 90 and the corresponding Senate Districts.[12] Nevertheless, the District Court implemented the objectionable districts in Act 82-629 as part of the Court's interim reapportionment plan.

In this respect, the District Court"s order squarely contravenes Section 5 of the Voting Rights Act, which provides that a standard, practice, or procedure may not be enforced by a covered jurisdiction unless it

> has been submitted by the chief legal officer or other appropriate official of such state or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such a submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission the Attorney General has affirmatively indicated that such an objection will not be made.

In *United States v Board of Supervisors of Warren County, Mississippi*, 429 US 652 (1977), this Court held that no District Court, except that in the District of Columbia, had the power to authorize a State to use an act which had not received the preclearance of the Attorney General.

The policy determinations of Congress in enacting the Voting Rights Act "reflect a congressional choice in favor of specialized review — either by the Attorney General of the United States

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injunction of a voting change "pending compliance with the preclearance requirements of §5."); *Canady v Lumberton City Board of Education*, _____US_____, 102 SCt 494, 70 LEd2d 373 (1981) (Court granted a stay to prohibit the implementation of an objected-to annexation).

[12]Senate Districts are formed by combining three contiguous House Districts. The corresponding Senate Districts are numbered 28, 29, and 30.

or by the United States District Court for the District of Columbia." *McDaniel v Sanchez*, 452 US 130, at 151. Any consideration by the District Court of the validity of the state's racially discriminatory policy contradicts the rule firmly established in prior cases that under the Voting Rights Act, the validity of such considerations is expressly "reserved by §5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia." *Perkins v Matthews*, 400 US 379, 386 (1971). See also, *Conner v Finch*, 431 US 407, 412 (1977); *Connor v Waller*, 421 US 656 (1975); *Allen v State Board of Elections*, 393 US 544, 561 (1969).

This rule was completely ignored by the District Court when it held (Appendix A, A-7, 9):

> The Supreme Court has made it clear that "reapportionment is primarily a matter for legislative consideration and determination." *White v Weiser*, 412 US 783, 795 (1973); *Upham v Seamon*, ___ US ___, 102 SCt 1518 (1982). In *Weiser*, the Supreme Court reversed the district court because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state plan." 412 US at p. 797.
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> Consistent with *Upham v Seamon, supra; White v Weiser, supra;* and *Terrazas v Clements, supra*, this Court is of the opinion that it is obligated to order the implementation on an interim basis of the redistricting of the Legislature as prescribed in Act No. 82-629 with the exception of the modification in Jefferson County.

This reliance was misplaced because there was no Voting Rights Act issue in *White v Weiser*: at that time Texas was not subject to the preclearance provisions of Section 5.

In *Upham v Seamon*, ___ US ___, 102 SCt 1518, 71 LEd2d 725, 730 (1982), this Court stated:

> We have never said that the entry of an objection by the Attorney General to any part of a State plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General.

But the *Upham* Court did not hold that a district court may consider as valid state policy parts of a legislative act to which the Attorney General has objected. *Upham* did not change the law as enunciated in *Warren County*: the State has the burden of proving that its act is not discriminatory in purpose or effect — and the proper forum for such an attempt at proof is *not* the local district court.

The District Court's order implementing as an interim plan the Black Belt legislative districts which the Attorney General has affirmatively indicated are objectionable fundamentally undermines the preclearance scheme of the Voting Rights Act and places the burden of time and persuasion on the innocent victims of racial discrimination — the intended beneficiaries of the Act. If this order is allowed to stand, it will also afford direct precedent for the State of Alabama and for other jurisdictions covered by the preclearance provisions of the Voting Rights Act to delay compliance with Section 5 long enough to force a federal district court to enter an interim plan which, as in the instant case, shifts the burden of time and persuasion in a manner the Voting Rights Act is designed to prevent. The District Court correctly allocated the burden in its earlier order of 21 May 1982: "the defendants be and they hereby are allowed until June 8, 1982, to obtain the necessary pre-clearance of their plan from the United States Department of Justice ***." However, in the 21 June order, this Court stated

> The letter of the Attorney General of the United States did not refuse to preclear the legislative plan of the Alabama Legislature. The Attorney General pointed out correctly that the law allows him sixty days within which to consider any plan. Understandably, he said that in the period of two weeks from the time the plan was submitted to him until June 8, his evaluation could not be favorably completed "at this time." In his earlier letter of May 25, the Attorney General stated that his analysis of the plan was "limited by extreme time constraints and a lack of opportunity for effective and informed public comment." The motion asks this Court to treat these statements as the Attorney General's rejection of Alabama's legislative

> plan. The Attorney General may still reject the plan. It appears clear that he has not acted in time for the elections to proceed in accordance with any decision he renders.

This makes it quite clear that the Court has placed the burden on the plaintiffs and the U.S. Attorney General, rather than the State.

The Attorney General's objection to Act 82-629 (dated 2 August) has now removed any possibility of an argument that the Court need not consider Section 5 questions because the Attorney General had not yet objected. This is clear from reading *Hathorn v Lovorn*, ___ US ___, 50 USLW 4664, 4667 n.16 (15 June 1982):

> Finally, the presence of a court decree does not exempt the contested change from §5. *** When state or local officials comply with a court order to enforce a state statute, there is no doubt that their actions "reflec[t] the policy choices of . . . elected representatives." Indeed, it §5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts. *** In light of *McDaniel* [*v Sanchez*, 452 US 130 (1981)], we conclude that a state court decree directing compliance with a state election statute contemplates "administ[ration]" of the state statute within the meaning of §5.

This holding in *Hathorn* is consistent with the decision in *Busbee v Smith*, an unreported decision. On 24 May, a three-judge District Court for the District of Columbia unanimously refused to allow the State of Georgia to use a plan for the election of members of Congress to which the Attorney General had objected. The Court noted,

> The State's apparent strategy is to proceed with implementation of Act No. 5 to such an extent that if the Act is not validated, the State can argue tha exigent circumstances dictate the use of the plan embodied in the Act for at least the upcoming elections.

Busbee v Smith, CA 82-0665, 24 May 1982, ms. op. at 3 n.1.

The District of Columbia Court correctly allocated the burden of Section 5 preclearance to the State, rather than to the

challengers, as did this Court in the instant case. Both *Hathorn* and *Busbee* hold that a court may not allow a State to utilize a statute that has not been submitted to and precleared by the U.S. Attorney General. To the extent that the District Court has done exactly that, it has erred.

The District Court has allowed the preclearance provisions of the Voting Rights Act to be turned into a potent new weapon in favor of the State against racial minorities, who not only must defer to the judgment of the U. S. Attorney General, but who must find themselves foreclosed from seeking plenary review and relief from racially discriminatory voting enactments. In the instant case, with the results afforded by the District Court's 21 June 1982 Order, it can fairly be argued that black citizens of Alabama would be better off without the Voting Rights Act; at least they would have been entitled to a full trial on their State and Federal constitutional claims and to timely relief when their civil action was originally filed in 1981 — a few days after the original apportionment act was passed.

III. The District Court Had Options Other Than The Adoption of the Objected-To Black Belt Districts.

When faced with the exigencies of time deadlines and impending elections, federal district courts have many options available to them in fashioning interim relief. But they do not have the option chosen by the District Court's 21 June Order of authorizing the implementation of state-adopted reapportioned districts that squarely violate the preclearance provisions of the Voting Rights Act; nor may a District Court justify a direct contravention of the Voting Rights Act on the ground that the alternative proposals of the parties are also objectionable. In this event, Appellants respectfully submit it is the duty of the District Court to choose some other option, among which are the following:

(1) Instruct the parties to modify their proposed plans to correct deficiencies noted by the Court or to present entirely new plans meeting the Court's specifications;

(2) Adopt its own reapportionment plan, using its own resources or by appointing an expert or master to accomplish the task for the Court;

(3) Instruct the Attorney General of the United States to appear as amicus curiae to advise the Court about his opinions concerning the appropriateness of the proposed plans under Section 5 standards or to propose the Attorney General's own plan.

If the choice of the aforesaid options or any others interpose substantial time delays, the Court should additionally consider options for adjusting the timing of elections, including the following:

(1) Postponing qualifying deadlines;

(2) Postponing other State deadlines for preparing for election;

(3) Ordering special procedures to be used to enable the primary elections to go forward on time;[13]

(4) Postponing the primary elections themselves;

(5) Ordering that no primary elections be held and that only the general election be conducted for the Alabama Legislature;

(6) Postponing both the primary and general elections for the Alabama Legislature until an adequate interim plan has been devised and a special election can be ordered.

Even though the above options involve delays which are undesirable and ought to be avoided, the District Court is duty bound to utilize one or another of such options if that is necessary to avoid a direct circumvention and violation of Section 5 of the Voting Rights Act. The explicit congressional purpose of Section 5 is to place the burdens of time and persuasion on

[13]The Legislature has already adopted Act 82-658, containing temporary measures to handle some of the problems that will develop in the legislative elections. The District Court could easily have utilized this Act as a statement of the legislative policy on how to conduct the elections if some modifications were necessary.

the State before it may implement new voting practices and procedures.[14] The District Court's order implementing as an interim plan the Black Belt legislative districts which the Attorney General has affirmatively indicated are objectionable fundamentally undermines the preclearance scheme of the Voting Rights Act and places the burdens of time and persuasion on the innocent victims of racial discrimination – the intended beneficiaries of the Act. If this order is allowed to stand, it will also afford direct precedent for the State of Alabama and for other jurisdictions covered by the preclearance provisions of the Voting Rights Act to delay compliance with Section 5 long enough to force a federal district court to enter an interim plan which, as in the instant case, shifts the burden of time and persuasion in a manner the Voting Rights Act is designed to prevent.

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[14]The *Busbee v Smith* Court, for example, has required the State of Georgia to schedule new primaries for its congressional seats because its earlier plan was objected to by the Attorney General under the Voting Rights Act. Atlanta *Journal*, 25 August 1982, p. 1.

CONCLUSION

For these reasons, the Appellants pray that the Court grant a stay of the District Court's order, and vacate and remand to the District Court for the purpose of implementation of a plan which does not adopt parts of the State's plan to which the Attorney General has objected.

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APPENDIX A

21 June decision and order

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM L. BURTON, PERCY D. BELL, ABRAHAM LINCOLN WOODS, JR., BOBBY JO JOHNSON, ANDREW HAYDEN, FELIX NIXON, EURALEE A. HAYNES, individually and on behalf of all other persons similarly situated Plaintiffs	)	
vs.	)	CIVIL ACTION NO.
WALKER HOBBIE, JR., in his official capacity as Judge of Probate of Montgomery County and as a representative of the class of all judges of probate in the State of Alabama; DON SIEGELMAN, in his official capacity as Secretary of State of Alabama Defendants	)	81-617-N [Filed June 21, 1982]
CHARLES A. GRADDICK, Attorney General for the State of Alabama Defendant-Intervenor	)	

Before FRANK M. JOHNSON, JR., Circuit Judge, HOBBS and THOMPSON, District Judges.

TRUMAN M. HOBBS, District Judge:

Plaintiffs brought this class action on behalf of themselves and all other black citizens of the State of Alabama on Novem-

ber 5, 1981, contending that the legislation directed toward reapportionment of the Alabama Legislature (Act No. 81-1049) violated the rights of black citizens under the Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and 42 U.S.C. §§ 1973 and 1983. Plaintiffs also charged that said reapportionment legislation impermissibly created large population variances in both legislative houses which are inconsistent with the equal protection requirement of the Fourteenth Amendment of the United States Constitution and also is violative of the Alabama constitutional requirement that requires preservation of county boundaries. Plaintiffs sought an injunction enjoining the defendants, the Probate Judge of Montgomery County, Alabama, and the Secretary of State of Alabama, from holding, supervising or certifying the candidates or results of any election for the House of Representatives or Senate of the Alabama Legislature under the reapportionment plan provided by said Act No. 81-1049. Plaintiffs also prayed that this Court would allow the Alabama Legislature a reasonable opportunity to enact a fair and racially non-discriminatory reapportionment plan subject to the preclearance provisions of the Voting Rights Act of 1965, as amended, (42 U.S.C. § 1973), and the approval of this Court. Alternatively, plaintiffs prayed that if the Alabama Legislature failed to enact such a reapportionment plan, this Court would order the implementation of a reapportionment plan for the legislative elections in September and November, 1982.

A three-judge court was convened pursuant to 28 U.S.C. § 2284(a). Jurisdiction of this Court was properly invoked pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4) for violations of the United States Constitution and Title 42 U.S.C. § 1983. On May 21, 1982, the Court certified plaintiffs as proper representatives of the plaintiff class and defendant Walker Hobbie, Jr. as a proper representative of defendant class and ordered the case to proceed as a class action.

Proceedings Relative to Legislative Effort to Reapportion

On May 6, 1982, the Attorney General of the United States

entered an objection to Act No. 81-1049 under the authority granted him by Section 5 of the Voting Rights Act, thereby rendering said Act unenforceable unless court review pursuant to said Act by the United States District Court for the District of Columbia reversed the decision of the Attorney General.

On May 10, 1982, plaintiffs filed an amended complaint pointing out the action of the Attorney General relative to Act No. 81-1049, and plaintiffs also petitioned for an emergency preliminary injunction, alleging that the objections of the Attorney General made it impossible to get a legislative reapportionment plan approved by the Attorney General in time for the legislative elections which have as their qualifying dates June 5 to July 9, 1982, with primary elections set for September 7, 1982.

This Court set a hearing on May 14, 1982. At that hearing defendants' attorneys advised the Court that they would seek an emergency session of the Alabama Legislature to secure passage of a new reapportionment plan which defendants would hope would meet the objections of the Attorney General. Following that hearing, this Court issued its order of May 21, 1982. This order directed plaintiffs to file their suggested interim reapportionment plan by May 21, 1982, and defendants were directed to file their amended suggested plan by June 4, 1982. By this Court's order, defendants were given to June 8, 1982 to obtain preclearance by the Attorney General of an amended legislative plan.

Because plaintiffs' redistricting plan was not filed with the Court on May 21, 1982, defendants were allowed additional time to file objections to plaintiffs' plan. Plaintiffs filed an Amended Plan A on June 4, 1982 and also filed a "Suggested Plan B" on that date. Defendants objected to consideration of these plans because defendants did not have the time to study adequately these plans.

On June 1, 1982, the Alabama Legislature enacted a second redistricting bill, Act No. 82-629, which defendants contend meets the objections of the Attorney General. Even before its enactment, the bill was submitted to the Attorney General. On

May 25, the Assistant Attorney General of the United States wrote the Attorney General of Alabama that the proposed modifications appear for the most part to address the May 6, 1982 objection. The letter of May 25 pointed out, however, the lack of opportunity for detailed analysis or informed public comment. The letter also commented that if the proposed legislation is enacted, the Attorney General would need further examination of redistricting in seven counties. After the proposed legislation was enacted by the Alabama Legislature, it was again submitted to the Attorney General. The Assistant Attorney General of the United States on June 8 gave his response to Act No. 82-629, stating that the Attorney General of the United States is not able to conclude in the limited time available that the enactment meets all of the concerns of the Attorney General as to six "Black Belt" districts and one Jefferson County district. In these circumstances, he wrote: ". . . our evaluation of your submission cannot be favorably completed at this time." The letter continued that in all other respects than with the enumerated seven counties, the redistricting in Act No. 82-629 meets the standards of the Voting Rights Act.

At a second hearing on June 14, 1982, all parties agreed that the Court must act within the next week if the scheduled elections can go forward at the times presently set for such elections. The parties agreed that any plan of redistricting adopted by the Court should be an interim plan. They also agreed that it would take this Court a week or more after it got the necessary data to make changes in the seven counties which would accord with plaintiffs' treatment of these counties in plaintiffs' Plan B. They conceded that because of the "ripple" effect of changing district lines within the Black Belt counties, the Court would probably have to change district lines in approximately thirty other counties. No one believed this could be done and adhere to the election schedule. Defendants urge as an interim solution the implementation of Act No. 82-629. Plaintiffs urge the adoption of plaintiffs' Plan B.

At the request of the Court, the parties on June 17, 1982, provided the Court with suggested modifications in the redistricting provided in Act No. 82-629 to meet the suspected concerns of the Attorney General as to the uncleared six Black Belt counties and District 36 in Jefferson County. The modification provided by defendants had the effect of reducing the number of said Black Belt counties which would be split, but it also had the effect of reducing the number of "safe" black districts; i.e., those with a black majority population of sixty-five per cent, from 2 to 1. In the opinion of this Court, defendants' proposed modification would not address the Attorney General's concerns in a way that would be constructive.

Plaintiffs' proposed modification of the legislative redistricting in the six Black Belt counties had a ripple effect in twenty-six counties beyond the six Black Belt counties. These twenty-six counties were ones where the Attorney General had found no unfavorable impact on black voters. Moreover, defendants urge that in some of the twenty-six counties, plaintiffs' proposed modification would create problems which Act No. 82-629 had addressed and solved to the satisfaction of the Attorney General.[1] This Court is unwilling to impose a modification on the legislative plan which does not have the effect of solving any dilution problem in the Black Belt counties and which would require the Court to ignore the approved legislative enactment in some twenty-six counties. If the Attorney General has been unable to form a judgment as to the impact of the legislative redistricting plan after the period of time that he had to study the two legislative plans, it is understandable that this Court is unable in the time available to it to form a judgment as to the impact of plaintiffs' proposed modification in some twenty-six counties plus the six Black Belt cou[illegible]

Plaintiffs have also proposed a modification in Jefferson County to meet the suspected concern of the Attorney General

[1]For example, defendants contend that the Attorney General was concerned about maintaining "influence" districts; i.e., districts where the black population is at least twenty-five per cent, as well as maintaining "safe" districts.

as to District 36. This modification addresses such a concern by making more compact Districts 36, 44 and 32, in an apparent effort to answer the Attorney General's expressed concern that Act No. 82-629 caused "the fragmentation of predominantly black communities."

Defendants presented no proposed modification with respect to Jefferson County, District 36.

This Court is of the opinion that plantiffs' proposed modification in Jefferson County would be an appropriate response to the Attorney General's concerns as to the fragmenting of black communities in District 36; therefore, the choice for the Court is the legislative plan as modified by plaintffs' proposal in Jefferson County or plaintiffs' proposed Plan B. The modifications in Jefferson County are attached hereto as APPENDIX A.

Arguments of Parties

The primary contention of defendants has always been that Act No. 82-629 should be implemented without modification on an interim basis. Plaintiffs' primary contention is that their Plan B should be implemented without modificaton on an interim basis.

Plaintiffs urge that Plan B is preferable to the legislative plan because it respects county lines to a far greater degree than the legislative plan, and the Alabama Constitution requires respect for county lines in redistricting where county lines do not have to yield to the equal protection requirement or other requirements of the United States Constitution.

Defendants urge that Plan B was not unveiled until June 4 or 5, 1982. They have not had an opportunity to study it. Defendants urge that the formulation of the legislative plan took months with corrections in the initial legislation resulting in Act No. 82-629, after inspection by many groups, including weeks of study by, and input from, the Attorney General. Defendants point out that the Attorney General has found no unfavorable impact on black voters in six of sixty-seven counties and has only declined to approve or disapprove the final re-

districting in the remaining seven counties because a week or more is insufficient time for hm to reach a concluson. Defendants u ge that if this Court, without any study of plaintiffs' Plan B by any group other than plaintiffs, scrap the work of months by many groups, including the work of the Alabama Legislature and the Attorney General of the United States, and substitute plaintiffs' untested and uninspected plan, it would violate the directions of the Supreme Court of the United States and the treatment of such cases by other three-judge courts in the Fifth Circuit.

Applicable Law

The Supreme Court has made it clear that "reapportionment is primarily a matter for legislative consideration and determination." *White v. Weiser,* 414 U.S. 783, 795 (1973); *Upham v. Seamon,* ____ U.S. ____ 102 S.Ct. 1518 (1982). In *Weiser,* the Supreme Court reversed the district court because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan." 412 U.S. at p. 797.

In *Upham,* the Supreme Court reversed the district court because it substituted its own plan for a legislative reapportionment plan which had been partially precleared by the Attorney General. The *Upham* court wrote:

> "Whenever a District Court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state political policy.' *Connor v. Finch,* 431 U.S. at 414, 97 S.Ct. at 1833. An appropriate reconciliation of these two goals can only be reached if the District Court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature." 102 S.Ct. at 1522.

In *Terrazas v. Clements,* CA No. 3-81-1946-R (N.D. Tex. Mar. 24, 1982), a three-judge court heard a challenge to the Texas legislative redistricting. The Texas redistricting was objected to by the Attorney General. The three-judge court nevertheless ordered implementation of the Texas legislative plan on an interim basis on the ground that there was insufficient time to do otherwise in view of the impending election. In the instant case, we are not even confronted with an Attorney General objection to the legislative plan—merely an inability to express a judgment because of insufficient time as to the districting in seven of sixty-seven counties.

The Supreme Court has authorized elections to be held

> ". . . that do not in all respects measure up to the legal requirements, even constitutional requirements. *See, e.g., Bullock v. Weiser,* 404 U.S. 1065 (1972); *Whitcomb v. Chavis,* 396 U.S. 1055 (1970). Necessity has been the motivating factor in these situations." *Upham v. Seamon,* 102 S.Ct. at 1522.

Because of severe time restraints, as to the primary contentions of the parties, this Court has a choice of implementing on an interim basis the legislative plan which has been evolving over months or plaintiffs' Plan B which has not been adequately studied or evaluated other than by plaintiffs.

Conclusion

All parties agree that due to substantial population shifts the existing legislative districts must be altered in order to comply with the Equal Protection Clause of the United States Constitution. It is conceded that there are as many "safe" black districts under Act No. 82-629 as under the 1972 court-ordered redistricting. The Court is also of the opinion that the Legislature has made an effort to stay within the constitutional requirements of the equal protection clause, "one-man, one vote." The main objection of plaintiffs is that the Legislature impermissibly disregarded county lines in the redistricting of Act No. 82-629.

Consistent with *Upham v. Seamon, supra; White v. Weiser, supra;* and *Terrazas v. Clements, supra,* this Court is of the opinion that it is obligated to order the implementation on an interim basis of the redistricting of the Legislature as prescribed in Act No. 82-629 with the exception of the modification in Jefferson County. In the event the Attorney General files an objection to the legislative redistricting indicating an objection to Act No. 82-629 different than this Court's modification in Jefferson County, and the defendants do not successfuly avail themselves of their right to appeal such decision as prescribed in the Voting Rights Act, and if the Alabama Legislature fails at its next session of the Legislature to adopt a redistricting plan which will be approved by the Attorney General of the United States pursuant to the Voting Rights Act of 1965, as amended, this Court will formulate a court redistricting plan.

This Court does not imply by its decision implementing Act. No. 82-629, with the modification heretofore noted, on an interim basis, that it has rejected plaintiffs' constitutional challenge under the Alabama Constitution that the Act has ignored county lines. Nor has it rejected plaintiffs' challenge that said Act has impermissibly allowed a greater deviation in population among districts than is consistent with the United States Constitution. These challenges will be addressed before a final redistricting plan is implemented or approved by this Court, but only after the Attorney General has completed his review as mandated by the Voting Rights Act, after the parties have developed a record adequate to present these issues, and after the Court has been allowed sufficient time to reach an informed opinion. An order will enter accordingly.

DONE this the 21st day of June, 1982.

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

/s/ TRUMAN HOBBS
United States District Judge

BURTON, et al. v. HOBBIE, etc., et al.
Civil Action No. 81-617-N

JOHNSON, Circuit Judge, specially concurring.

While concurring fully in the opinion of the Court, I feel compelled to set forth in greater detail the rationale of my decision.

The parties have stipulated that the current reapportionment plan in Alabama contains population variances that exceed the tolerable limits imposed by the one person-one vote requirement of the Equal Protection Clause. The parties further agreed that the Court should fashion an interim plan for the upcoming November elections. Thus the only issue now facing this Court is the nature of the interim reapportionment plan that should be imposed.

Each of the parties submitted proposed plans to the Court. Defendants largely contend that the Court is obligated to utilize the legislature's plan, Act No. 82-629, on an interim basis. Plaintiffs proposed two plans, A and B, and stressed to the Court that those plans adhere more closely to county boundaries than does Act. No. 82-629. At the direction of the Court, the parties also presented a series of modifications of Act No. 82-629 that are designed to assuage the concerns of the Justice Department.

The constraints imposed by the rapidly approaching election mandate that this Court adopt one of the plans suggested by the parties. Unfortunately, all of the plans contain significant defects. Act No. 82-629 totally disregards the integrity of county lines. Boundaries of at least 30 counties would be unnecessarily split by the plan, in apparent contravention of Ala. Const. Art. IX, §§ 198, 199 & 200. Without impugning the motive of the Alabama Legislature, the utter disregard of county boundaries obviously makes more credible plaintiffs' claims that the legislature engaged in racial gerrymandering.[1] Act No. 82-629 also

[1]The Court had significant difficulty with the legislature's complete disregard for the integrity of county boundaries. The legislature may have been motivated in part by the Court's failure to adhere to county bounda-

inexplicably divides cohesive black communities in a number of instances, particularly in the Black Belt region. Such divisions raise the specter that boundaries of districts were intentionally drawn in order to avoid creating "safe" black senate seats.[2]

Despite the problems with the legislative plan, the plans and modifications submitted by the plaintiffs are no better. The plans are not racially neutral but instead discriminate against white citizens of the State of Alabama. Both plans A and B submitted by plaintiffs pair a substantial number of white house

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ries in imposing the existing reapportionment plan. *See* Sims v. Amos, 336 F. Supp. 924 (M.D. Ala.), *affirmed*, 409 U.S. 942 (1972). Significantly, however, the *Sims* Court implemented a reapportionment plan that contained de minimis population variances of plus/minus one percent. To devise districts with only de minimis variances as required by the Supreme Court, *see* Wise v. Lipscomb, 437 U.S. 535, 541 (1978); Connor v. Finch, 431 U.S. 407, 415 (1977), it was impossible to create districts that did not split numerous counties. The Alabama Legislature's plan contains population variances of up to plus/minus five percent. Thus the legislature does not operate under the same population constraints and therefore has substantially less justification for dispensing with county boundaries than the *Sims* Court.

Henceforth, the legislature should be on notice that total disregard for county boundaries that cannot be justified by the one person-one vote requirement of the Equal Protection Clause will be accorded close scrutiny by the Court.

[2]The defects in Act No. 82-629 are even more glaring in light of the actions taken by the Justice Department. In refusing to preclear the original reapportionment plan enacted by the Alabama Legislature, the Justice Department highlighted problems in Jefferson County and in the Black Belt region. The legislature attempted to revise the plan in a special session. On May 25, 1982, the date that Act No. 82-629 was apparently reported out of committee, the Justice Department informed the legislature that six districts in the Black Belt and one district in Jefferson County raised "troublesome" questions that would "require more particular examination" if the Act was to be adopted unchanged. The letter specifically noted problems with the fragmentation of black communities an dahe disregard for county boundaries. The legislature, however, chose to ignore the Justice Department's warnings and adopted the "troublesome" districts intact. Not surprisingly, the Justice Department refused to preclear Act No. 82-629 on an expedited basis. In refusing to preclear the plan, the Justice Department essentially repeated the rationale articulated in the May 25 letter.

and senate members against each other.[3] With one insignificant exception, none of the black house or senate members would be required to run against other incumbents.[4] In fact, counsel for plaintiffs acknowledged that one district in Plan B was intentionally altered in order to eliminate the possibility that two black incumbents would be placed in the same district.

Plaintiffs' proposed modifications of Act No. 82-629 suffer from similar difficulties. In order to redraw the seven districts that troubled the Justice Department, plaintiffs' proposed modifications would require the alteration of approximately 30 house districts. In some of the "modified" districts, plaintiffs "packed"' already "safe" black house dstricts in order to create additional black senate seats. They did so by dractically reducing the percentage of blacks residing in certain surrounding "influence" districts.[5] Thus, the plaintiffs were not satisfied

[3]Plan A would require 16 out of 32 white incumbents to run against each other. One white senator was also paired against a black incumbent in a district that contains a black population in excess of 64 percent. Additionally, Plan A would pair 38 of 92 white house members against each other. A single black house member would be paired against a white incumbent in a district with a black population of over 70 percent. Similarly, Plan B would require 18 out of 32 white senators and 33 out of 92 white house members to run against each other. One black house member and one black senator would be paired against white incumbents in districts containing large majorities of black voters. Thus, plaintiffs' plans do not just pair a few incumbents in the same districts. Instead, the plans pair from 37 percent to 41 percent of the white house members and 53 percent to 60 percent of the senators.

[4]Plans A and B would require only one black senator and one black house member to run against another incumbent. In each instance, however, the black legislator would be paired against a white legislator in a district with a substantial black majority. The plans therefore would insure the continuity of all black incumbents but would place a significant number of white legislators in jeopardy.

[5]A district containing a majority population of 25 percent or more is considered an "influence" district.

In Act No. 82-629, house districts 77 and 80 each contain a black population of about 65 percent. Adjacent district 81, an influence district, contains a black population of about 29 percent. Plaintiffs' modifications would have increased the population of black in district 77 and 80 to over 80 percent. The black population in district 81 would be reduced to 3.1 percent. The "'packing" of house districts 77 and 80 was designed to create a "safe" black senate district.

with redrawing districts in order to correct problems in the Black Belt region. Instead, they used the modifications as a guise to create additional black senate seats in other regions of the State. While the plaintiffs' goals command sympathy, their actions undermine any notion that the proposed modifications are racially neutral.[6]

During the more than a quarter of a century that I have been a federal judge, I have endeavord to consistently demonstrate that discrimination by the State on the basis of race, color or creed transgresses the Federal Constitution and cannot be tolerated. Necessarily involved in this philosophy is the concept that the State may not act in a manner that discriminates against black citizens in favor of white citizens. Equally ingrained in this concept, however, is an intolerance to suggestions that a court participate in a plan that is designed to discriminate and, if implemented, would have the effect of discriminating in favor of blacks over whites. Plaintiffs' proposed plans A and B and their proposed modifications of Act No. 82-629, in my judgment, ask this Court to place its imprimatur upon plans that appear to be designed to discriminate against whites in favor of blacks. Defendants' proposed plan and modifications ask this Court to approve plans that appear to be designed to discriminate against blacks in favor of whites. Neither is acceptable.

Nonetheless, the election deadlines continuue their inexorable approach and an interim plan must be implemented. Unfortunately, in adopting a plan, the Court does not have the luxury of choosing the better of several good plans. Instead, the Court is forced to choose from several plans, each of which contains substantial defects. In such circumstances the Court defers, as it must, to the legislature and adopts with some

[6]Plaintiffs' proposed modifications clearly cause retrogression in a number of districts. Moreover, it is not altogether clear that the plaintiffs' proposed modifications compensate for the retrogression in other distracts. Because of the exacting standards accorded court-ordered plans by the Supreme Court, *see* Wise v. Lipscomb, *supra*, 437 U.S. 535, I am extremely hesitant to adopt modifications by the plaintiffs that would result in such retrogression.

alteration Act No. 82-629 as an interim reapportionment plan. In so doing, this Court remains aware that for the third consecutive decade the Alabama Legislature has abrogated its duty and failed to adopt a reapportionment plan that is constitutionally acceptable. Furthermore, this Court is cognizant that the legislature continue to employ questionable reapportionment practices that suggest some form of racial gerrymandering. Thus, the legislature should not construe this Court's actions, as reflected in the majority opinion, as an expression of approval of Act No. 82-629. Following the November elections, when the exigent circumstances no longer exist, this Court intends to accord Act No. 82-629 and the practices of the legislature the plenary review that time does not now permit.[7]

Done, this the 21st day of June, 1982.

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

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[7]Contrary to the views espoused in the dissent, this opinion does not eternally freeze the number of black representatives in the Alabama Legislature. The default in the plans submitted by the plaintiffs is not that they created additional "safe" black seats or increased the percentage of black voters in certain districts. For example, this Court agrees with plaintiffs and the Justice Department that the contorted shape of district 36 in Jefferson County improperly dilutes black voting strength. Accordingly, this Court will not permit the district to remain intact. The net result is that black citizens in the Birmingham area have one additional majority district that did not exist in the 1972 apportionment plan.

A reapportionment plan that is racially neutral may well increase the number of black seats in the Alabama Legislature. Certainly, there would be no objection to the adoption of a plan that would be racially neutral and at the same time would increase the number of black seats in the legislature. Unfortunately, this Court did not have such a racially neutral plan before it. *See* notes 3 & 4, *supra*.

BURTON, et al. v. HOBBIE, etc., et al.
Civil Action No. 81-617-N

THOMPSON, District Judge, dissenting.

By its action today, this Court unjustifiably chooses to adopt, albeit for an interim period, and to give the judicial imprimatur to a reapportionment plan, Act No. 82-629, as modified by the Court, which this Court knows fails to pass muster as not being an abridgement of the right to vote of minorities in the western "black belt" legislative districts of the State of Alabama. As a result, this Court winks at Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and turns its back on the specific group of people that section was intended to protect. Accordingly, I must dissent.

I

Some additional background, which the Court fails to give, is appropriate.

The main opinion correctly notes that the Attorney General of the United States has failed to preclear either of the two reapportionment plans, Act No. 81-1049 and Act No. 82-629, submitted to him pursuant to Section 5, thereby leaving the Alabama legislature without a legally enforceable reapportionment plan for the impending 1982 elections. Both the main and concurring opinions also correctly conclude that as a result this Court is faced with the unfortunate exigent circumstances of having to choose an interim reapportionment plan from several proposed plans, each of which has not received the detailed consideration it deserves, so that the election process may go forward. However, both the main and concurring opinions overlook the fact the fault for these unfortunate circumstances lies squarely with the Alabama legislature because it has failed to act in a timely fashion as required by the law with which it is all too familiar.

As early as 1962, this Court indicated to the legislature what its responsibility was and continues to be: that periodic, timely reapportionment according to the requirements of the law is

first and foremost a matter for consideration and determination by the legislature. *Sims v. Frink,* 208 F. Supp. 431, 441 (M.D. Ala.), *aff'd sub nom. Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964). Nevertheless, even though the legislature was aware that the population variances in its current districting plan for both the House and the Senate exceeded what was allowed under the Fourteenth Amendment and further that any new reapportionment plan would have to be precleared by the Attorney General pursuant to Section 5, it was not until October 21, 1981, less than eight months before the machinery for the 1982 elections was to move into gear with the qualification of persons as candidates, that the Alabama legislature passed a new reapportionment plan for the 1982 elections, Act No. 81-1049; it was not until January 1982, almost three months after the plan was passed and less than six months before the election process was to begin, that the plan was submitted to the U. S. Attorney General for preclearance pursuant to Section 5; and it was not until April 1982, less than two months before the election process was to begin, that the submission was deemed "complete" by the Attorney Gneral. As to the second plan, Act No. 82-629, it was not passed by the legislature and submitted to the Attorney General until June 1982, as a result of a suggestion by this Court that the legislature try to cure the defects in Act No. 81-1049 before the impending election deadlines.

And yet this Court, twenty years after *Sims v. Frink,* primarily in the name of exigency, ignores Section 5 and imposes on a people who are not in any way responsible for the unfortunate circumstances facing this Court a plan which the Attorney General has found fails to meet Section 5 standards.[1] I am of the opinion that, in view of the legislature's nonfeasance as demonstrated above and in view of there being at least one

[1]Contrary to what the main opinion implies, the Attorney General specifically stated that "we are unable to conclude on the basis of the State's explanation of these matters that the burden under Section 5 has yet been met respecting the House and Senate districts in these areas." Thus, the Attorney General found that the State had failed to meet the Section 5 standards based on the present record.

plan more acceptable than Act No. 82-629, this result is unwarranted.

II

Both the main and concurring opinions allow, based upon premises which are unsupported by the record, the use of the state's facially unacceptable redistricting plan, Act No. 82-629. Moreover, the Court has before it at least one, if not two, plans which merit use before the state's plan; and yet the Court still allows the State of Alabama to implement its plan in violation of Section 5 of the Voting Rights Act.

The plans which the parties now urge upon the Court are generally described as follows. Act No. 82-629, the legislative plan, provides for three safe black senate seats and twelve safe black house[2] seats, resulting in the same number of safe black seats as is provided by the 1972 court-ordered plan. This plan is apparently modeled to some degree after the 1972 plan in order to preserve the present boundaries of the present incumbents' districts. Consequently, the district boundaries in Act No. 82-629 are oddly drawn and pay no respect to county lines. The plan fragments many black communities, including House District 36 in Jefferson County, splits many of the western "black belt" counties into two or more house districts, and groups black majority counties in the "black belt" with majority white "non-black belt" counties. The defendants themselves have conceded that two districts of Act No. 82-629 contain substantive violations of Section 5. That is, these two districts have large retrogressions in black voting strength from the 1972 plan to the present plan.[3] *See, e.g., Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357 (1976). As noted above, the Attorney General has refused to preclear those portions of the plan dealing with the western "black belt" districts and House District 36 in Jefferson County.

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[2]Not included in the figure as a safe black district is House District 103, which is 64.9% black; the current representative from that district is black.

[3]One, District 45, drops from 69% black to 67% black; and the other, District 88, drops from 56% to 48.7% black.

The plaintiffs' proposed modifications of Act No. 82-629 attempt to resolve the objections of the Attorney General in the "black belt" and in Jefferson County, while at the same time doing the least possible violence to the remainder of the plan. The modifications, by honoring the plaintiffs' stated policy of preserving county lines and avoiding fragmentation of black communities, create one additional safe black house district and one additional safe black senate district in the western "black belt" counties.[4] The Jefferson County modification, which the Court adopts, increases the black population of District 36 from 39% to 53.2% by "unpacking" one of Act No. 82-629's black districts, House District 44. The plan also does have a ripple effect, changing the boundaries of approximately 28 other districts.

The plaintiffs' plan B is notably different from any other plan before the Court. This plan directly addresses the potential of racial gerrymandering created by leaving redistricting boundaries to the unbridled discretion of the legislature. It succeeds to a large extent in maximizing the preservation of county boundaries while maintaining a $\pm 5\%$ population deviation. This plan results in sixteen safe black house districts and three safe black senate districts, an increase of approximately three black representatives over Act No. 82-629.

The attacks by the Court on the plaintiffs' plans—that is, their modifications and plan B—in an attempt to justify its acceptance of a plan which violates the Voting Rights Act are without basis in the record. Even assuming that the criticisms have some merit—which they do not—they still do not warrant the Court's rejection of the plans in favor of one which fails to meet Section 5 standards.

The Court in the main opinion, after acknowledging the Attorney General's pending concerns with Act No. 82-629's

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[4]The additional safe house seat is labelled District 84 in the plaintiffs' modifications; it corresponds to Act No. 82-629's District 90. This district consists of parts of Choctaw County and all of Greene and Sumter counties. The additional safe black senate seat is labelled District 28. It is composed of Wilcox, Sumter, Greene, Hale, Perry, and Lowndes counties and parts of Dallas and Choctaw counties.

potential abridgment of the right to vote of minorities, goes on to reject the plaintiffs' modifications because they do not solve the vote dilution in the "black belt" counties. This criticism is unsupported by the record. The modifications in fact create two additional safe black districts. They also address the concerns, expressed by the Attorney General and echoed by many "black belt" citizens who spoke at the public hearing before the Joint Reapportionment Committee of the state legislature, regarding the legislative plan's calculated departure from county lines in drawing its districts.[5]

Second, the main opinion rejects both the plaintiffs' modifications and plan B because they require too extensive changes in the legislative plan. All parties, however, agree that correction of Act No. 82-629 to meet the Attorney General's concerns would require changes in approximately 30 districts; the plaintiffs' modifications reach no further.

Finally, in view of the legislature's refusal to address adequately the Attorney General's concerns after being put on notice by the rejection of Act No. 81-1049, the main opinion's rejection of the minimum changes essential to correct the objectionable areas in Act No. 82-629 is unjustified. Deference to the legislature does not extend so far as to allow the Court to reject the remedy of a plan to which the Attorney General has objected. *See, e.g., Upham v. Seamon*, ... U.S. ....., 102 S.Ct. 1518, & n.7 (1982) (per curiam). Nevertheless, it is clear in this case that the Court's deference to the legislative plan has precluded its giving the plaintiffs' proposals the consideration deserved.[6] Such deference to a legislative plan which the Attorney General has refused to preclear, under the circumstances in this case, exceeds the limits of fairness and equity.

The concurring opinion, unlike the main opinion, addresses the merits of the alternative plans. After having also acknowl-

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[5]Plan B, as noted above, addresses these same concerns state-wide.

[6]The main opinion also suggests that plan B must be rejected because it has not been subjected to the intensive scrutiny which the legislative plan has endured. This suggestion was refuted by the plaintiffs. Plan B was submitted for consideration by the state legislature and rejected. It has also been submitted to, and considered by, the Attorney General.

edged the apparent problems with Act No. 82-629, the concurring opinion goes on to adopt the legislative plan, apparently in the view that it is the lesser of several evils. The thrust of this opinion's criticism of the plantiffs' proposals is that they "discriminate" against whites.[7] This criticism is unfounded. The grounds for this criticism appear to be, as to the modifications, that they unnecessarily created additional majority black senate seats outside of the "black belt" by packing already safe black house seats. All parties concede that in order to address properly the Attorney General's objection in the "black belt" the modifications would extend or ripple outside the "black belt." The modifications did not exceed the predicted necessary ripple effect.[8]

Moreover, the plaintiffs' modifications created only one additional safe senate seat (district 28)—and this seat was in the "black belt."[9] There was also one 61% black population senate district created (district 26), which is not by definition a safe seat.[10] There is no evidence whatsoever that these modifications

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[7]It is ironic that the main opinion rejects the plaintiffs' modifications in part because they do not do enough to relieve vote dilution in the black belt, whereas the concurring opinion rejects the modifications on the ground that they do too much and discriminate against whites.

[8]The necessity of the extension of the modifications outside the "black belt" was demonstrated by the modifications submitted by the defendants, who refused to extend outside the "black belt." These modifications, purportedly submitted in response to the Court's order to address the concerns of the Attorney General, actually caused a retrogression of black voting strength.

[9]This district was composed of Act No. 82-629's house districts 83, 86, and 90.

[10]The only other house districts to which the concurrence's "packing" allegations might conceivably apply are house districts 98 and 99 in Mobile. Those districts were, however, already "packed" under the 1972 plan; the plaintiffs' modifications therefore act only to prevent retrogression, measured strictly by percentages of black population, in those districts. The legislative plan measured by the same standard, in contrast, causes retrogression in both districts.

The senate seat (district 33) of which these two house districts are parts under the plaintiffs' modifications was already a safe senate seat under Act No. 82-629. There is thus no basis for the charge that the plaintiffs used the modifications as a guise to create black senate seats elsewhere, for these seats already existed.

were inappropriate responses to the Attorney General's objections regarding the configuration of house and senate districts in these areas. To the contrary, the safe black senate seat resulted from natural configuration and the 61% black senate seat was created to offset retrogression elsewhere.

Nor is there any evidence in the record that any other of the ripple effects of the plaintiffs' modifications were unwarranted. In view of the fact (1) that the modifications had to extend outside the "black belt" counties and (2) that the modifications' prevention of overall retrogression necessarily created counter effects in other areas, there is simply no evidence from which it can be concluded that the plaintiffs' modifications unnecessarily created additional black districts.

Other than the modifications themselves, the Court has no evidence that the modifications discriminate against whites. Therefore the concurring opinion bases its conclusion of discrimination, as it must, solely on the fact that the modifications result in two additional safe black districts. If such evidence, when considered with the fact that there are now only three black senators out of 35 and thirteen black representatives out of 105 in a state which has a black population of 26%, were enough to support a claim of discrimination, the force of the evidence would be in a direction opposite to that claimed in the concurring opinion of the Court.

As to plan B, the concurring opinion states that the proposal is not racially neutral because the burden of its tendency to pit incumbents against each other falls most heavily on whites. Again, initially it must be noted that only sixteen of 140 of Alabama's present legislators are black. The fact that this plan pairs no two blacks against each other is offset significantly by consideration of these figures: the likelihood of two of the sixteen black incumbents being paired against each other, or of one black incumbent being paired against a white, is considerably less than the likelihood of two of 119 whites being paired against each other, even assuming a random drawing of districts.

Neither the plaintiffs' modifications nor plan B, however, contain a random drawing of districts. Rather, both plans address the Attorney General's concern regarding the legislative plan's failure to honor the integrity of county lines; they do this in an attempt to avoid the potential for racial gerrymandering inherent in the state's approach to redistricting. Finally, the plaintiffs' proposals, which draw their districts based upon county lines, are drawn not on a blank slate but on a map already occupied by incumbents residing in oddly configured districts. The results are inevitable: incumbents are forced to run against each other and, because the overwhelming number of legislators are white, most of those paired against each other are white. Such is the cost of a plan designed along neutral lines to minimize racial gerrymanding of blacks. To draw from such a plan the inference of deliberate discrimination against whites refuses to blacks in this state any neutral guidelines to prevent racial gerrymandering.

Most importantly, even assuming that the concurring opinion's criticisms of the plaintiffs' plan are true, the established violations of Section 5 by Act No. 82-629 are significantly more egregious than the speculative concerns the concurrence poses as to the plaintiffs' proposals. The speculations cannot justify the adoption of a plan with clear violations of Section 5.

III

The Court in both the main and concurring opinions also fails to give Section 5 the consideration it is due.

The Voting Rights Act was enacted with the express intention of "rid[ding] the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S.Ct. 803, 812 (1966), and Section 5 of the act was specifically designed to provide more stringent protection for minority voting rights in areas where minorities have historically been the subjects of pervasive discrimination. *Id.* at 308, 315, 86 S.Ct. at 808; *Allen v. State Board of Elections*, 393 U.S. 544, 548, 556, 89 S.Ct. 817, 822, 826-27 (1969). Alabama is one of those

areas. *See, e.g., South Carolina v. Katzenbach, supra,* 383 U.S. at 329, 86 S.Ct. at 819.

To enforce minority voting rights in these areas, Section 5 requires that before a state covered by the Voting Rights Act may enact a change in a voting procedure, including a state reapportionment plan, *see, e.g., McDaniel v. Sanchez,* 452 U.S. 130, 153, 101 S.Ct. 2224, 2238 (1981), it must first obtain a ruling from either the Attorney General or the U. S. District Court for the District of Columbia that such plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. To obtain this preclearance under Section 5, the covered state must carry the burden of proving the absence of a discriminatory purpose or effect. Such an extensive and strict remedial measure was needed because previous legislation and the attempts of courts to implement the legislation had proved ineffective in combating the various ingenious methods used by officials in some states to prevent minorities, in particular blacks, from the full and free exercise of their franchise. The measure was designed to place the "burden of proof" on the covered states so as to protect minorities in those states from again running the risk of having their franchise taken away by last minute pieces of legislation. *South Carolina v. Katzenbach, supra,* 383 U.S. at 313-16, 86 S.Ct. 810-12.

But today, what was not to have occurred under Section 5 has occurred, for the people of the western "black belt" are now subjected to a last minute measure by a state legislature—a measure which the Attorney General has found, according to the evidence presented to him, fails to meet Section 5's standards.

Furthermore, the Supreme Court has indicated that a district court in fashioning an interim reapportionment plan should follow the appropriate Section 5 standards, including the body of administrative and judicial precedent developed in Section 5 cases, *McDaniel v. Sanchez, supra,* 101 S.Ct. at 2235 (1981), and further, that a district court in fashioning an interim plan is obligated to give "deference" only to those parts of a legis-

latively drafted plan which have been found by the Attorney General to meet Section 5 standards, *Upham v. Seamon*, ____ U.S. ____, 101 S.Ct. 1518 (1982) (per curiam). In view of these principles, the history of Section 5 as well as the facts that the Alabama legislature for over twenty years has failed to meet its obligations under the law, that the present exigent circumstances are due totally to the inaction of the legislature, and that the legislature has presented this Court with a plan which fails to meet Section 5 standards, I am of the opinion that in such circumstances, as are now presented to this Court, it is time that in the balance some "deference" be given to persons whom laws, such as Section 5, were intended to protect.

IV

In conclusion, I am of the opinion that this Court has unwarrantedly imposed upon the people of the western "black belt" of this state a legislative plan which is violative of federal law, dealt Section 5 of the Voting Rights Act a severe blow, and allowed the Alabama legislature to bootstrap itself, by its own knowing nonfeasance, into a position which it could not otherwise have had under federal law. In this, I cannot concur.

DONE, this the 21st day of June, 1982.

/s/ MYRON H. THOMPSON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM L. BURTON, PERCY D. BELL, ABRAHAM LINCOLN WOODS, JR., BOBBY JO JOHNSON, ANDREW HAYDEN, FELIX NIXON, EURALEE A. HAYNES, individually and on behalf of all other persons similarly situated Plaintiffs	)	
vs.	)	CIVIL ACTION NO.
WALKER HOBBIE, JR., in his official capacity as Judge of Probate of Montgomery County and as a representative of the class of all judges of probate in the State of Alabama; DON SIEGELMAN, in his official capacity as Secretary of State of Alabama Defendants	)	81-617-N [Filed June 21, 1982]
CHARLES A. GRADDICK, Attorney General for the State of Alabama Defendant-Intervenor	)	

ORDER

Pursuant to the opinion of this Court made and entered this date, it is

ORDERED that Act No. 82-629, which was enacted by the Alabama Legislature after the Attorney General of the United States objected to Act No. 81-1049, be modified as set out in the Appendix to this opinion, and, as modified, implemented

as an interim plan with the express provision that if the Attorney General of the United States objects to said plan and the objection is not overruled by the District Court for the District of Columbia, or if this Court subsequently sustains plaintiffs' other objections to this interim plan; then, in either of those events, the interim redistricting plan shall not be effective for any election after December 31, 1983.

This Court will consider plaintiffs' other objections to Act No. 82-629 if the Attorney General does not object to Act No. 82-629 within the time prescribed by the 1965 Voting Rights Act, as amended. If the Attorney General objects to said Act (other than to request the adoption of the Court's modification), and such objection is not overruled, or if this Court sustains plaintiffs' other objections to Act No. 82-629, the Legislature may attempt to enact a valid plan. If such plan is not approved by the Attorney General or if it does not meet any objections which may be found by this Court to be present in the present redistricting plan, as modified, this Court will proceed to draw a permanent court-ordered plan for the apportionment of the Alabama Legislature.

DONE this the 21st day of June, 1982.

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

/s/ TRUMAN HOBBS
United States District Judge

APPENDIX B

28 June order denying reconsideration

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM L. BURTON, PERCY D. BELL, ABRAHAM LINCOLN WOODS, JR., BOBBY JO JOHNSON, ANDREW HAYDEN, FELIX NIXON, EURALEE A. HAYNES, individually and on behalf of all other persons similarly situated Plaintiffs	)	
vs.	)	CIVIL ACTION NO.
WALKER HOBBIE, JR., in his official capacity as Judge of Probate of Montgomery County and as a representative of the class of all judges of probate in the State of Alabama;	)	81-617-N
DON SIEGELMAN, in his official capacity of Secretary of State of Alabama Defendants	)	[Filed June 28, 1982]
CHARLES A. GRADDICK, Attorney General for the Defendant-Intervenor	)	

BEFORE FRANK M. JOHNSON, JR., Circuit Judge, HOBBS and THOMPSON, District Judges.

TRUMAN M. HOBBS, District Judge:

OPINION AND ORDER

Plaintiff's motion to alter or amend the Court's interim reapportionment plan asserts that this Court has violated Section 5 of the Voting Rights Act by implementing on an interim

basis a legislative plan that squarely violates the preclearance provisions of the Voting Rights Act. The statements in support of the motion ignore several facts.

(1) All parties agreed two weeks ago that this Court would have to designate an interim redistricting plan by June 18, or the election could not proceed as scheduled, and all parties urged this Court to adopt a plan on or before that date. This Court was still eliciting and receiving proposed plans by the parties as late as June 17. This Court's order did not issue until June 21. Now on June 25, plaintiffs urge this Court to consider a plan submitted for the first time which has not been analyzed or even viewed by any persons other than plaintiffs. Plaintiffs have been working with various redistricting plans for many months. Apparently they misconceive the ease with which this Court can analyze a redistricting plan and pronounce it superior to other plans.

(2) The letter of the Attorney General of the United States did not refuse to preclear the legislative plan of the Alabama Legislature. The Attorney General pointed out correctly that the law allows him sixty days within which to consider any plan. Understandably, he said that in the period of two weeks from the time the plan was submitted to him until June 8, his evaluation could not be favorably completed "at this time." In his earlier letter of May 25, the Attorney General stated that his analysis of the plan was "limited by extreme time constraints and a lack of opportunity for effective and informed public comment." The motion asks this Court to treat these statements as the Attorney General's rejection of Alabama's legislative plan. The Attorney General may still reject the plan. It appears clear that he has not acted in time for the elections to proceed in accordance with any decision he renders.

(3) Plaintiffs suggest that the Court's interim plan will encourage the Legislature to wait until the last minute and then rely on a court to implement which has not been precleared by the Attorney General. This is foolish talk. The interim plan of the Court will inevitably require legislators to run for office for a term that extends for little more than a

year if the Attorney General fails to preclear, or if this Court holds other constitutional objections of plaintiffs are valid. No legislator reasonably wants such a result. This situation has been created in large part at least by legislative delays and the legislators will be forced to pay the price for the fact that that neither this Court nor the Attorney General have had adequate time to study the final legislative plan or alternative plans. This Court considered allowing the 1982 elections to proceed for an interim period using present districts, but this would necessitate a severe violation of the one-man, one vote principle as required by the Equal Protection Clause of the Fourteenth Amendment. (Incidentally, it was conceded by plaintiffs that their proposed plan had population deviations in excess of the legislative plan; and this Court has concerns as to whether it would pass a constitutional challenge as a court-ordered plan, which, as all parties have recognized, would be subject to even stricter standards than a legislative plan.)

(4) Plaintiffs state that this Court, by denying their post-judgment modification plan, is allowing them "one and only one chance" to make detailed reapportionment proposals. This is simply incorrect. This Court considered numerous plans of plaintiffs prior to its decision in this case. It considered plaintiffs' Plan A, plaintiffs' modified Plan A, plaintiffs' Plan B, and plaintiffs' June 17 modified plan. If plaintiffs now have a better product, it will receive consideration if the Court is forced to devise its own permanent plan. This Court did what all parties agreed last week was necessary—entered a final decision in order to allow the elections to proceed.

(5) Belatedly and inconsistently, plantiffs now suggest as an alternative the postponing of all elections until the Attorney General or this Court can approve a redistricting plan. This suggestion if implemented, would have the effect of encouraging legislators to procrastinate with constitutional redistricting requirements since they would remain in office until the new elections could be held after the process of redistricting had been completed. The Court was unanimous in rejecting this possibility.

(6) Plaintiffs' motion refers to objections to plaintiffs' proposals contained in the Court's opinion which objections were not in the Court's opinion. That opinion was squarely based on the inability of this Court to devise a plan or analyze proposed plans within the time constraints urged on this Court at that time by all parties, and the belief that this Court should not totally throw out the legislative plan on the basis of what the Attorney General characterized as his inability to preclear the plan without more time for study and analysis.

(7) Finally, this Court modified the legislative plan in Jefferson County to the extent the Court thought it could perceive the objections of the Attorney General. It declined to modify the plan as suggested by plaintiffs on June 17, because this would have required redistricting in some twenty-six counties beyond the Black Belt counties. This Court does not now reject the latest modification plan of plaintiffs, nor does it now reject the plaintiffs' earlier plan designated as plaintiffs' Plan B. This Court has decided only that the scheduled elections will take place on an interim basis using the legislative plan as modified by its opinion. The Court adheres to this view.

Accordingly, the Court denies plaintiffs' motion to alter or amend the Court's interim reapportionment plan.

It is so ORDERED this 28th day of June, 1982.

/s/ FRANK M. JOHNSON, JR.

United States Circuit Judge

/s/ TRUMAN HOBBS

United States District Judge

BURTON, et al. v. HOBBIE, etc., et al.
Civil Action No. 8-617-N

THOMPSON, District Judge, dissenting.

The plaintiffs have now presented to the Court on alternative plan, plan D, which substantially succeeds in meeting both the objections expressed by the Attorney General to the state's plan adopted by this Court and the objections to the plaintiffs' prior plans expressed for the first time by one member of this Court in the June 21, 1982, opinions. Moreover, contrary to the implications raised today by the majority opinion, plan D can easily be implemented in time for the primary and general elections to proceed on schedule, with possibly some modifications to the qualifying deadlines for candidates. Nevertheless, this Court now unjustifiably persists in its earlier adoption of a plan which the Attorney General has found fails to meet Section 5 standards for the western "black belt" districts.

For the above reasons, as well as the reasons expressed in my dissent of June 21, 1982, I again dissent.

DONE, this the 28th day of June, 1982.

/s/ MYRON H. THOMPSON
United States District Judge

APPENDIX C

10 August order

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

WILLIAM L. BURTON, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
WALKER HOBBIE, JR., etc., t al., Defendants,	)	81-617-N
CHARLES A. GRADDICK, etc., Defendant-Intervenor.	)	[Filed Aug. 10, 1982]

ORDER

Plaintiffs' motion filed with this Court August 6, 1982, asking that this Court vacate its order of June 21, 1982, adopt plaintiffs' Plan B or, in the alternative, modify the June 21 order by adopting plaintiffs' Plan D and adopt a new election schedule, is ORDERED to be and is hereby denied.

Done, this the 10th day of August, 1982.

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

/s/ TRUMAN HOBBS
United States District Judge

BURTON, et al. v. HOBBIE, etc., et al.
Civil Action No. 81-617-N

THOMPSON, District Judge, dissenting.

I am of the opinion, as expressed in my earlier dissents, that the court acted improperly when it approved in the face of several acceptable alternative plans a legislative reapportionment plan which the U. S. Attorney General had refused to preclear under Section 5 of the Voting Rights Act, as amended. 42 U.S.C. § 1973c. *See, e.g., Jordan v. Winter,* No. GC 82-80-WK-O, slip op. at 9 (N.D. Miss. June 8, 1982) ("injudicious," "inappropriate," and "unseemly" to adopt, even on an interim basis, a plan which the Attorney General had rejected). Today, in spite of the fact that the Attorney General has now "formally" rejected the state's plan, the court nevertheless persists in its approval of the state's plan—a plan which the Attorney General has found abridges the right to vote of blacks in the western "black belt" of the state. In so doing the court again disregards the Voting Rights Act and allows the state to use this court's equitable powers to enforce a plan which is otherwise legally unenforceable under the Act.

The court's approval of this plan, even on an interim basis, is especially unwarranted in view of the fact that there are alternative plans which could be implemented in time for the upcoming elections and which would not be unduly disruptive of the election process. The only changes required by the plaintiffs' proposals would move the primary election date to September 28, the usual primary runoff date, and move the runoff date to October 16, or alternatively, would reschedule the election dates, as described above, for only those districts altered by the necessary modifications to the state's plan and would leave the election dates in the other districts as presently scheduled. While these changes would admittedly cause somewhat greater inconvenience and expense to the candidates and the state than would adherence to the present court-ordred plan, this inconvenience and expense is greatly outweighed by the injury to the right to vote of blacks in the western "black belt" which will be

caused by the election of a legislature according to the present plan. Such inconvenience and expense does not justify such a broad and substantial violation of the right to vote.

Because the court's action allows the state, by the use of this court's processes, to circumvent Section 5 and places a judicial imprimatur upon a plan with clear violations of the right to vote of a group of citizens whom Section 5 was intended to protect, as well as for the reasons expressed in my earlier dissents, I must now also dissent from the court's denial of the plaintiffs' motion to amend the court-ordered plan.

DONE, this the 10th day of August, 1982.

/s/ MYRON H. THOMPSON

United States District Judge

APPENDIX D

First Notice of appeal, 1 July 1982

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM L. BURTON, et al., Plaintiffs,	)	
v.	)	C A NO 81-617-N
WALKER HOBBIE, JR., etc. et al., Defendants,	)	
CHARLES A. GRADDICK, etc., Defendant-Intervenor.	)	[Filed July 1, 1982]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs appeal to the Supreme Court of the United States from the orders of the District Court adopting an interim plan of apportionment of the Alabama Legislature and refusing to modify same, entered on 21 June and 28 June 1982. This appeal is taken pursuant to 28 USC § 1253.

Submitted by,

/s/ EDWARD STILL

Edward Still
Suite 400 Commerce Center
2027 1st Ave N
Birmingham AL 35203
205/322-6631

APPENDIX E

Second Notice of Appeal, 12 August 1982

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM L. BURTON, et al., Plaintiffs,	)	
v.	)	CA NO 81-617-N
WALKER HOBBIE, JR., etc. et al., Defendants,	)	
CHARLES A. GRADDICK, etc., Defendant-Intervenor.	)	[Filed 12 August 1982]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs appeal the the Supreme Court of the United States from the order of the District Court refusing to modify an interim plan of apportionment of the Alabama Legislature, entered on 10 August 1982. This appeal is taken pursuant to 28 USC § 1253.

Submitted by,

/s/ EDWARD STILL

Edward Still
Suite 400 Commerce Center
2027 1st Ave N
Birmingham AL 35203
205/322-6631

APPENDIX F

Attorney General's letter of 25 May

May 25, 1982

Honorable Charles A. Graddick
Attorney General
State of Alabama
Montgomery, Alabama 36130

Dear Mr. Attorney General:

This is in reference to your proposals for modifications in the legislative district boundaries so as to cure the May 6, 1982 objection interposed by the Attorney General pursuant to Section 5 of the Voting Right Act of 1965, as amended, 42 U.S.C. 1973c, to Act No. 81-1049 of the 1981 Alabama Legislature. The most recent modifications, designated "Plan E," were presented to this Department only today.

Based on our analysis to date, the proposed modifications, if enacted into law appear for the most part to address the May 6, 1982 objection. We caution however, that our review to date has been limited by extreme time constraints and a lack of opportunity for effective and informed public comment. We also cannot know at this time what alternative propposals, if any, might be offered or the Legislature's reaction to them. Should further analysis and information during the sixty-day period allowed for the Attorney General's determination after a formal submission under Section 5 reveal that the State has not met the burden of proving that the plan has neither the purpose nor effect of discriminating on the basis of race, it would be necessary to interpose an objection.

Beyond these procedural obstacles to our ability to render a final decision on your proposal at this time, our preliminary analysis has identified two areas which will require more particular examination should the proposal be enacted and submitted for preclearance. These areas consist of proposed Districts 83, 85, 86, 87, 88 and 90 (referred to sometimes as the

"Black Belt") and proposed District 86 (corresponding to existing District 33 in Jefferson County). While the statistical results of these configurations suggest no readily apparent problem, the manner in which predominantly minority communities have been fragmented by district lines, and certain counties have been divided, raise troublesome questions. In the event that the Legislature should decide to adopt the proposed configuration in these areas, on review of the formal submission we will, as required by the Act, look to the Legislative record and comments of interested members of the public for a full response to these concerns.

Sincerely,

/s/ WM. BRADFORD REYNOLDS

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX G

Attorney General's letter of 8 June

8 June 1982

Honorable Charles A. Graddick
Attorney General
State of Alabama
Montgomery, Alabama 36130

Dear Mr. Attorney General:

This is in reference to the reapportionment of the Alabama Legislature by H.B. 19 (1982), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on June 2, 1982. In accordance with your request expedited consideration has been given this submission pursuant to Section 51.32 of the Procedures for the Administration of Section 5 (46 Fed. Reg. 877).

In our letter of May 25, 1982, we expressed continuing concern with the configuration of "Black Belt" Districts 83, 85, 86, 87, 88 and 90, as well as proposed District 36 in Jefferson County. We noted that the fragmentation of predominantly black communities by these districts raised "troublesome questions," the resolution of which would require a full response based on the "Legislative record and comments of interested members of the public." Also noted as a matter of particular concern to us was the calculated departure in the configuring of these districts from the Legislature's stated criterion of honoring the integrity of county boundaries to the fullest extent possible. After as thorough an examination as time has permited of the information provided to us to date, we are unable to conclude on the basis of the State's explanation of these matters that the burden under Section 5 has yet been met respecting the House and Senate districts in these areas.

In these circumstances, our evaluation of your submission cannot be favorably completed at this time. We will, of course,

continue to entertain any additional information forwarded to us regarding the proposed plan during the remainder of the 60-day review period required by statute. Since you have been requested to report to the court by June 8, 1982, on the status of Section 5 review, it will be necessary for you to advise the court that with respect to the districts mentioned above, preclearance has not yet been obtained. In all other respects you may advise the court that, in the opinion of the Attorney General, H.B. 19 (1982) meets Section 5 standards.

We are taking the liberty of providing copies of this letter to the Court in *Burton v. Hobbie* (M.D. Ala.).

Sincerely,

/s/ WM. BRADFORD REYNOLDS

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX H

Attorney General's letter of 2 August

August 2, 1982

Honorable Charles A. Graddick
Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Dear Mr. Attorney General:

This is in reference to the reapportionment of the Alabama Legislature by Act No. 82-629 (H.B. No. 19), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submision was received on June 2, 1982.

After a thorough analysis of all the information available to us, we are unable to conclude that the proposed plan as it affects the areas outlined in our June 8, 1982, letter is free of the proscribed purpose or effect. In reaching this conclusion, we have carefully examined the possibility of developing a non-retrogressive reconfiguration of districts in the "Black Belt" area in question (Districts 83, 85, 86, 87, 88 and 90) that is more faithful to the State's articulated criteria of adherence to county boundaries and minimal fragmentation of minority communities. Our analysis demonstrates that several such alternatives are available without causing an undue "ripple effect" on the adjacent districts. The State has failed to explain satisfactorily why it adopted, instead, a configuration for the "Black Belt" area that departs measurably from the stated criteria and offers less prospect for the black voters in those districts to participate fully in the electoral process. Accordingly, I must, on behalf of the Attorney General, interpose an objection to Act No. 82-629.

In reaching this conclusion, I am mindful of your letter of July 28, 1982, requesting that the 60-day period for review of

the State's submission be extended. Under the statute, the review period can only be altered on a request by the Attorney General for additional information necessary to our analysis of the submission or when we have received from the submitting authority documents and information materially supplementing a submission. Such a request would be inappropriate in this situation where a full exchange of all pertinent information has already occurred.

Since the Procedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection, you may, of course, submit any comments on our analysis in the course of seeking reconsideration. In addition, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the proposed reapportionment legally unenforceable.

Sincerely,

/s/ WM. BRADFORD REYNOLDS

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX I

Voting Rights Act, §5

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to adminiter any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualfication, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right

to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.

APPENDIX J

Plaintiffs' motion to amend plan after Attorney General's objection To Act 82-629

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM L. BURTON, et al., Plaintiffs,	)	
v	)	C A NO 81-617-N
WALKER HOBBIE, JR., etc. et al., Defendants,	)	
CHARLES A. GRADDICK, etc., Defendant-Intervenor.	)	[Filed Aug. 6, 1982]

PLAINTIFFS' MOTION TO AMEND PLAN AFTER ATTORNEY GENERAL'S OBJECTION TO ACT 82-629

1. As more fully discussed in the Memorandum filed simultaneously with this Motion, the District Court has placed itself squarely in conflict with the Voting Rights Act by allowing the State of Alabama to utilize Act 82-629 (as modified slightly by the Court) for the 1982 elections. This conflict can be resolved by adopting a new plan or modifying the existing one.

2. The present election schedule is as follows:

—29 July: Secretary of State certified to probate judges the candidates for the legislature and judges began to have ballots printed.

—17 August: absentee ballots must be available for distribution for primary

—7 September: Primary Elections

—28 September: Run-off Primaries

—12 October: absentee ballots must be available for distribution for general election

—2 November: General Election

3. By making this motion for interim relief, the plaintiffs do not waive their federal and state constitutional claims.

WHEREFORE, the plaintiffs pray that the Court grant the following relief:

A. Vacate its order of 21 June, adopt plaintiffs' Plan B, and utilize the election schedule in C, below.

B. In the alternative, modify the 21 June Order by adopting plaintiffs' Plan D (including Option 1 or 2 for the Senate) and utilize the election schedule in C, below, for those districts which are changed by Plan D.

C. Adopt a new election schedule as follows:

— 23 August at 5 p.m. for the qualifying with political parties;

— 28 August at 5 p.m. for the political parties to certify names of legislative candidates to the Secretary of State and the respective probate judges simultaneously;

— 28 September for the primary election (this is the date set by law for primary runoff);

— 16 October for the primary runoffs (this date is a Saturday);

— 2 November for the regularly scheduled general election;

— or adopt some other election schedule which allows the various political parties and state official sufficient time to carry out their duties.

D. Enjoin the Secretary of State to withhold all certificates of election for the legislature until 10 days after he has received the returns of election from the judges of probate for the special election ordered by this Court.

E. Order the defendants to act as if "the general election" for purposes of Section 46 of the Alabama Constitution does not take place until the special election for legislators has been completed.

F. Order the defendants to make all necessary preparations to hold the special legislative election as set out herein and a special legislative election on the first Tuesday after the first Monday in November 1983 for the election of a new legislature.

G. Schedule proceedings on the plaintiffs' state constitutional and federal constitutional and statutory claims without any further deference or delay to allow the Alabama Legislature a third opportunity to adopt a constitutional plan of apportionment.

Submitted by,

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APPENDIX K

Order adopting new schedule for submission of apportionment plan August 1982

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

WILLIAM L. BURTON, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
WALKER HOBBIE, JR., etc., et al., Defendants,	)	81-617-N
CHARLES A. GRADDICK, etc., Defendant-Intervenor.	)	[Filed Aug. 10, 1982]

ORDER

The court has been informed that the United States Attorney General on August 3, 1982, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, formally objected to the State of Alabama's legislative reapportionment plan, Act No. 82-629. Accordingly, it is

ORDERED that the defendants in this action file with this court by February 1, 1983, a valid legislative reapportionment plan which has met the preclearance requirements of Section 5, by means of approval either by the United States Attorney General or by the United States District Court for the District of Columbia. Otherwise, as indicated in this court's order of June 21, 1982, the court will proceed to draw a permanent court-ordered plan for the reapportionment of the Alabama legislature.

DONE, this the 10th day of August, 1982.

/s/ MYRON H. THOMPSON
United States District Judge

APPENDIX L

Defendants' motion for reconsideration of order establishing reapportionment deadlines, 13 August

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

WILLIAM L. BURTON, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
WALKER HOBBIE, JR., etc., et al., Defendants,	)	81-617-N (three judge court)
v.	)	
CHARLES A. GRADDICK, etc., Defendant-Intervenor.	)	

MOTION FOR RECONSIDERATION OF ORDER ESTABLISHING REAPPORTIONMENT DEADLINE

Defendants Charles A. Graddick, Attorney General of the State of Alabama, and Walker Hobbie, Jr., respectfully move the Court to reconsider and vacate its August 10, 1982 order establishing February 1, 1983 as the deadline for filing a legislative reapportionment plan, and to establish a later deadline which will allow the reapportionment process to proceed in an orderly fashion. As grounds for and in support of this motion for reconsideration, these Defendants show unto the Court as follows:

1. By order of August 10, 1982, this Court established February 1, 1983 as the deadline for filing with the Court "a valid legislative reapportionment plan which has met the preclearance requirements of Section 5 [of the Voting Rights Act]." The Court noted that, in the absence of such a filing, the Court would order its own permanent reapportionment plan into effect.

2. The process of "preclearance" of a legislative reapportionment plan, whether it be by way of submission to the Attorney General of the United States or a declaratory judgment action in the United States District Court for the District of Columbia, requires substantial time. In the present case, preclearance will be sought, at least in the first instance, through the Department of Justice, because of the Department's familiarity with Alabama's prior reapportionment efforts. Under the procedures for administration of Section 5, the Attorney General has sixty (60) days after a covered matter is submitted to make a decision. 28 CF.R. §§ 51.40, 51.41.

Frequently, particularly when complex matters such as legislative reapportionment are under consideration, the Attorney General requests supplemental information regarding the State's submission. 28 C.F.R. § 51.37. In such cases, the Attorney General's decision is often delayed beyond the initial 60 day period. In the instant case, the Attorney General took almost four months to rule on Alabama's initial submission. While expedited consideration may be requested, the Attorney General is under no obligation to accede to the requst. 28 C.F.R. § 51.32.

3. After a reapportionment plan is passed by the Legislature, but before it can be submitted for preclearance, substantial work is necessary by the State Attorney General in order to have the submission materials comply with the Justice Department's Section 5 regulations. See 28 C.F.R. § 51.24, *et. seq.*

4. If this Court does not reconsider its deadline of February 1, 1983 for filing a "precleared" plan, it will be necessary for a plan passed by the Legislature to be submitted for Justice Department review not later than December 1, 1982. Such a schedule would allow the Attorney General 60 days for review, but would *not* include any leeway for submission of additional information.

5. In order to submit a plan to the Attorney General by December 1, 1982, the plan would have to be passed by the Legislature by mid-November of 1982, since some time will be needed to prepare the submission materials. *For the following*

reasons, it is extremely unlikely that the Alabama Legislature could enact a reapportionment plan by November 15, 1982:

(a) Under section 29-1-4 of the *Code of Alabama* (1975), the Legislature cannot convene in its post-election Organizational Session until the second Tuesday in January of 1983 (January 11, 1983. At this session, the House of Representatives will elect a Speaker, and both houses will organize their respective committee structures in order to be able to conduct legislative business. Legislation cannot be considered or passed at the Organizational Session. Amendment 57, *Constitution of Alabama of 1901*.

(b) After the new Legislature has organized itself in January, it could be called into special session to deal with the reapportionment problem, hopefully in late January or early February of 1983 (prior to the commencement of the 1983 Regular Session in April.)

(c) Prompt submission of a legally sound Legislative plan passed in such a special session, followed by a 60 day period of consideration by the Attorney General, would presumably lead to preclearance by late spring of 1983. Then this Court would have reasonable time to conduct hearings and make any decisions which are appropriate under the circumstances. This would allow a special election, if appropriate, to be conducted in the fall of 1983, with a reasonable time for the Legislature to be re-constituted for the 1984 Regular Session, which does not commence until the first Tueday in February of 1984. Section 29-1-4, *supra*.

6. To place a deadline of February 1, 1983 for enactment, preclearance and filing of a new reapportionment plan could foreclose any meaningful legislative effort at reapportionment, as well as restrict the period for "informed public comment" which the Justice Department requires as a condition to preclearance of "controversial or potentially controversial changes." 28 C.F.R. § 51.26 (e).

7. Even if the deadline for filing a new legislative plan is extended beyond February 1, 1983, the Court could still require the parties to submit by February 1, 1983 contingency

plan which could be studied and considered by the Court and parties and thus be ready for implementation in the event the Legislature does not enact a plan which receives Justice Department preclearance and this Court's approval.

WHEREFORE, THE PREMISES CONSIDERED, these Defendants move the Court to reconsider and vacate its August 10, 1982 order, and to establish a deadline for filing a precleared legislative plan not later than June 1, 1983.

Respectfully submitted,

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FILED
SEP 30 1982
ALEXANDER L. STEVAS,

No. 82-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM L. BURTON, *et al.*,
Appellants,

v.

WALKER HOBBIE, JR., *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama (three-judge court)

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether plaintiffs challenging a reapportionment may seek to have this Court postpone imminent elections after having failed to request such relief from the District Court?

2. Whether a District Court which has directed that state legislative elections proceed under an interim reapportionment plan, subject to the preparation of a permanent plan and new elections in 1983, abused its discretion by adhering to that order when the United States Attorney General interposed an objection to the plan under the Voting Rights Act after the election process was well underway?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-360

WILLIAM L. BURTON, *et al.*,
Appellants,

v.

WALKER HOBBIE, JR., *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama (three-judge court)

MOTION TO DISMISS OR AFFIRM

Appellees Walker Hobbie, Jr., et al., hereby respectfully move that this Court dismiss the appeal or affirm the judgment below.

INTRODUCTION

In this case appellants seek relief from implementation of an interim reapportionment plan for the upcoming general election for the Alabama State Legislature.[1] Appel-

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[1] On September 7, 1982, following Justice Powell's denial of appellants' application for a stay pending appeal, primary elections were held pursuant to the challenged plan. Runoff elections were held on September 28.

lants argue that the plan adopted by the District Court (per Circuit Judge Frank M. Johnson, Jr., and District Judge Truman M. Hobbs), which is essentially identical to Act 82-629, the plan passed by the State Legislature, violates the Voting Rights Act of 1965 and thus cannot be implemented even on a temporary basis. As will be shown, appellants' argument is utterly lacking in merit, and the appeal should be dismissed or the judgment of the District Court affirmed.

STATEMENT OF THE CASE

On October 26, 1981, the Alabama State Legislature passed Act 81-1049, which reapportioned both the State House and the State Senate.[2] Appellants brought suit in the District Court, charging, *inter alia*, that Act 81-1049 violated the Fourteenth and Fifteenth Amendments.[3] The District Court allowed discovery to go forward, but refused to reach the merits of the appellants' claims until

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[2] The Legislature modeled Act 81-1049 after the existing reapportionment plan, which was implemented by court order in 1972. *See Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942. In doing so, the Legislature sought to follow the suggestion of the District Court that the court-ordered plan be used as the foundation for future reapportionments. *See Sims* v. *Amos*, 365 F. Supp. 215, 223 (M.D. Ala. 1973), *aff'd sub nom.*, *Wallace* v. *Sims*, 415 U.S. 902.

[3] Appellants claim that, under Act 81-1049, two black incumbents "were purposefully placed in the same district in central Birmingham so that a new seat in north Shelby County (Birmingham suburban area) with an overwhelming white majority could be created." Jurisdictional Statement ("Jur. St.") at 2 n.1. This is simply untrue. In fact, the creation of a district in Shelby County resulted from the dramatic population growth there over the past decade (74.3% as opposed to 12.9% for the State as a whole) rather than any racially discriminatory purpose. The demographics of Shelby County resulted in this district having a large white majority, as demonstrated by the fact that the alternative plans urged upon the District Court by the appellants also create a district with an "overwhelming white majority" in Shelby County.

Act 81-1049 had received preclearance from the United States Attorney General under Section 5 of the Voting Rights Act.

On May 6, 1982, the Attorney General interposed an objection to Act 81-1049. The District Court, recognizing the need to implement a reapportionment plan in time for the 1982 state legislative elections, ordered the parties to propose interim plans. The Court ordered appellants to submit a plan by May 21, but the appellants did not do so until June 4, at which time they proposed two alternative plans, known as "Amended Plan A" and "Plan B."[4] The Court allowed the State until June 4 to submit a proposal and until June 8 to obtain preclearance from the Attorney General.

The plans proposed by appellants largely disregarded the districts drawn by the State Legislature, and appellants' preferred alternative, Plan B, had an overall popu-

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[4] Appellants' tardy filing of their proposed plans with the District Court belies their assertions (Jur. St. at 3) that they have acted "with dispatch" while the State has moved slowly. In fact, the State took only six months after receiving the 1980 census data in April 1981 to complete the massive task of designing and enacting a plan. Moreover, the State has moved expeditiously both in court and before the Department of Justice. By contrast, the appellants' attorneys, knowing that the Attorney General was required by 28 C.F.R. § 51.8 to complete his review of Act 81-1049 by March 29, 1982 (i.e., within sixty days of the submission of the Act) waited until March 9 to submit their comments on the Act to the Department of Justice. The State's attorneys did not receive these comments until March 16. The Department of Justice asked the State for further information, thereby extending the time for the Attorney General to complete his review. *See* 28 C.F.R. § 51.37. The State responded in a letter dated April 2, 1982. The Attorney General did not object to Act 81-1049 until more than a month later, on May 6. The State immediately began drafting a new plan and presented its proposals to the Department of Justice in only eleven days. Attorneys for the State worked virtually around the clock for the next two weeks to negotiate changes in district lines with the Department of Justice and to obtain passage of Act 82-620.

lation variance in excess of the 10% level this Court has deemed *de minimis*. Moreover, as noted by Judge Frank Johnson,

> [t]he plans are not racially neutral but instead discriminate against white citizens of the State of Alabama. Both Plans A and B submitted by plaintiffs pair a substantial number of white house and senate members against each other. With one insignificant exception, none of the black house or senate members would be required to run against other incumbents. In fact, counsel for plaintiffs acknowledged that one district in Plan B was intentionally altered in order to eliminate the possibility that two black incumbents would be placed in the same district. [Appendix A at A-11—A-12 (Johnson, J., concurring) (note omitted).] [5]

The plan submitted by the State in timely fashion on June 4 (Act 82-629) was developed in response to the Attorney General's objection letter. At a series of meetings held on May 21, 22, 24 and 25, 1982, attorneys for the State and the Department of Justice extensively discussed how Act 81-1049 could be modified so as to obtain preclearance. On the basis of these negotiations, the State Legislature, after being called into special session by Governor Fob James, passed Act 82-629 on June 1, 1982. On that same day, Act 82-629 was submitted to the Department of Justice for preclearance. The State explicitly requested a decision from the Department of Justice by June 8 in order to comply with the District Court's order.

To meet the Attorney General's objection to Act 81-1049, Act 82-629 made changes in 55 of the 105 House Districts which had been proposed in Act 81-1049. These changes resulted in the creation of an additional district

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[5] Unless otherwise noted, citations to appendices refer to the appendices attached to the Jurisdictional Statement.

over 65% black in Birmingham (House District 38) and two such districts in the so-called "Black Belt" area (House Districts 83 and 86).[6] In addition, Act 82-629 eliminated retrogression in eleven other districts to which the Attorney General had objected (House Districts 19, 20, 33, 36, 46, 59, 65, 71, 81, 90 and 102). Implementation of Act 82-629 will in all likelihood result in the election of fifteen black Representatives this November; by contrast, under the plan ordered into effect by the District Court in 1972 (*Sims* v. *Amos*, *supra*), thirteen black Representatives were elected in the last general election.[7]

On June 8 the Department of Justice issued a letter preclearing the overwhelming majority of districts created by Act 82-629. The only districts that did not receive preclearance at that time were House District 36 in Jefferson County (Birmingham) and House Districts 83, 85, 86, 87, 88 and 90 in the "Black Belt", as well as Senate Districts 13, 28, 29 and 30, containing these House

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[6] The "Black Belt" is an area in the west central part of Alabama, comprising roughly Autauga, Lowndes, Wilcox, Dallas, Perry, Marengo, Hale, Greene, Choctaw, Sumter and Pickens Counties. The name "Black Belt" derives from the color of the soil in this area. Both House Districts 83 and 86 had white incumbents. Thus, appellants are incorrect in stating that, under Act 82-629, "[o]nly one white legislator was given a district with more than 65% black population." Jur. St. at 5 n.9.

[7] In the 1978 general election, blacks were elected in House Districts 38, 39, 41, 43, 44, 45, 49, 67, 77, 80, 98, 99 and 103. In the September 7 primary, which was held pursuant to Act 82-629, as implemented, black candidates won the Democratic nomination (which is tantamount to election) in all thirteen of these districts and in House District 86 as well. In House District 83, a black candidate received the most votes on September 7 and won the September 28 runoff. Under the 1972 court-ordered plan three black Senators were elected in 1978, and all three won the Democratic nomination on September 7.

Districts.[8] Significantly, the Attorney General interposed no objection at that time to the districts that had not been precleared, but rather stated that he would "continue to entertain any additional information forwarded to us regarding a proposed plan during the remainder of the 60-day review period required by statute." Appendix G at A-40.

The District Court subsequently asked the parties to submit alternative configurations for the districts that the Attorney General had not yet precleared. The State submitted a plan and the appellants offered their Plan C but all parties reiterated their preference for the plans they had previously advanced.

On June 21, 1982, the District Court ordered Act 82-629 into effect as an interim plan with one modification: the District Court chose the configuration of House Districts 32, 36 and 44 in Jefferson County offered by the appellants rather than that adopted by the State in Act 82-629.[9] The District Court based its decision on a number of factors, including the obligation to defer to the districting preferences of the State insofar as possible and the time constraints imposed by the upcoming elections. The District Court rejected the appellants' proposal for redrawing the unprecleared "Black Belt" districts (Plan C) because it reconfigured not only those six districts but also twenty-six others which had already been precleared. Appendix A at A-5; *id.* at A-12 (Johnson, J., concurring).

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[8] Senate districts are formed by grouping three contiguous House districts.

[9] In describing the June 21 order, appellants incorrectly state that "[t]he District Court adopted the plaintiffs' proposed modification in Jefferson County by rearranging the boundaries of the district to which the Attorney General had interposed an objection and to two adjacent districts." Jur. St. at 4. In fact, as of June 21, no objection had been interposed.

The Court also noted that the modifications of Act 82-629 proposed by the appellants would have resulted in the reduction of the percentage of blacks in certain "influence" districts (districts where the black population is at least 25%). *Id.* at A-5 & n.1. The District Court was reluctant to accept such modifications since, as the State pointed out, the Attorney General's objection to Act 81-[illegible] had made special mention of the need to preserve existing levels of black voting strength in such districts. *Id.* The concurring opinion observed that Plan C, appellant's proposal, also discriminated against white citizens of the State of Alabama.

> In some of the "modified" districts, plaintiffs "packed" already "safe" black house districts in order to create additional black senate seats. They did so by drastically reducing the percentage of blacks residing in certain surrounding "influence" districts. Thus, the plaintiffs were not satisfied with redrawing districts in order to correct problems in the Black Belt region. Instead, they used the modifications as a guise to create additional black senate seats in other regions of the State. [Appendix A at A-12—A-13 (Johnson, J., concurring) (notes omitted)].

Appellants' motions in the District Court to alter or amend [10] and for a stay of the District Court's order were denied on June 28. Appendix B. Appellants noted their appeal to this Court (Appendix D) and unsuccessfully applied to Justice Rehnquist and to Justice White for a stay. Following the filing deadline for candidates for the

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[10] In appellants' motion to alter or amend, they asked the District Court to implement yet another proposal, Plan D. This proposal reconfigured five already precleared districts in addition to the six unprecleared Black Belt districts. The District Court refused to implement Plan D, observing that appellants "misconceive the ease with which this Court can analyze a redistricting plan and pronounce it superior to other plans." Appendix B at A-28.

State Legislature on July 9, 1982, campaigning for House and Senate seats began.

With the election process already well under way, the Attorney General interposed an objection to Act 82-629 on August 2, 1982, the last day on which he could do so. *See* 28 C.F.R. § 51.8. On August 6, only a month before the primary, appellants asked the District Court to vacate its order of June 21 implementing Act 82-629 with slight modification as the interim plan. Appellants argued that the Voting Rights Act prohibited the District Court from using districts to which the Attorney General had objected, even on an interim basis. On August 10, 1982, the District Court denied the appellants' motion. Appendix C. Appellants noticed an appeal (Appendix E) and applied to Justice Powell for a stay. Their application was denied on August 31.

The District Court has given the State until March 1, 1983 to pass a new reapportionment and to obtain preclearance. Order of August 27, 1982 (attached hereto as Appellees' Appendix 1).[11] The District Court has announced its intention "to require an election for new legislators under a permanent plan no later than the fall of 1983."[12] Appellees' Appendix 1 at 2a

On September 7, primary elections were held using the interim plan. The runoff election was held September 28, and the general election is scheduled for November 2. Thus, the State is on the last lap as far as this year's legislative elections are concerned.

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[11] The District Court's August 27 order apparently was not available to the appellants when the Jurisdictional Statement was filed on August 31. The District Court had previously ordered the State to submit a precleared plan by February 1 (Appendix K), but upon motion of the State (Appendix L) extended the deadline to March 1.

[12] The appellants' statement that the District Court "did not specify when a special election . . . would be ordered," Jur. St. at 6, is incorrect, since the District Court's August 27 order makes clear that elections will be held no later than the fall of 1983.

ARGUMENT

EXIGENT CIRCUMSTANCES JUSTIFIED THE DISTRICT COURT'S REFUSAL TO MODIFY THE INTERIM PLAN FOLLOWING THE ATTORNEY GENERAL'S OBJECTION

1. Appellants assert that

> [t]he instant appeal addresses the District Court's more recent refusal [on August 10, 1982] to modify its interim plan even though that plan utilized the six Black Belt House Districts and corresponding Senate Districts to which the Attorney General entered a formal objection on 2 August 1982. [Jur. St. at 5-6].

We observe at the outset that the issue presented by appellants in this Court differs from that raised by them in the District Court. Appellants asked the District Court to adopt either their Plan B or Plan D and then utilize the election schedule which they proposed (see Appendix J at A-46). That the District Court so understood appellants' motion is apparent from the language of the August 10 order, which states:

> Plaintiffs' motion filed with this Court August 6, 1982, asking that this Court vacate its order of June 21, 1982, adopt plaintiffs' Plan B, or in the alternative, modify the June 21 order by adopting plaintiffs' Plan D and adopt a new election schedule, is ORDERED to be and is hereby denied. [Appendix C at A-32].

In this Court, however, appellants do not challenge the District Court's rejection of their alternative plans. Appellants' sole claim of error is that the District Court failed to postpone the upcoming general election.[13] But

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[13] Their prayer for relief is consistent with this approach. They seek to have this Court

> grant a stay of the District Court's order, and vacate and remand to the District Court for the purpose of implementation

appellants never argued to the District Court that the election should be postponed because of the August 2 objection, even if neither of their proposed plans was adopted. Whatever may have prompted this tactic,[14] appellants cannot simply shift gears and present to this Court an issue never raised below. For this reason, we submit that their appeal should be dismissed. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 323, n.1.[15]

2. In essence, appellants take the position that a District Court may *never* implement, even on a temporary basis, districts to which the Attorney General has interposed an objection. Appellants must take this absolutist position because, notwithstanding their assertion to the

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of a plan which does not adopt parts of the State's plan to which the Attorney General has objected. [Jur. St. at 15].

If this prayer were granted the District Court would be required, prior to the election, to adopt some alternative plan of its own, which, of course, would require additional time, as the Court's June 21 and June 28 orders make clear. See Appendix B at A-30 (June 21 opinion was predicated "on the inability of this Court to devise a plan or analyze proposed plans within the time constraints urged on this Court at that time by all parties").

[14] Plaintiffs may have hoped that, if faced with the choice of allowing the elections to go forward on the basis of the plan which had been disapproved (as to certain districts) by the Attorney General, and allowing it to go forward on the basis of one of the alternative plans submitted by plaintiffs, but disapproved by the District Court, the Court would prefer the latter alternative. Possibly too, the plaintiffs refrained from asking the District Court to develop its own plan and to postpone the election (the relief sought here) because the Court had previously ruled unanimously that a delay which would extend the present incumbents' term was unacceptable, see p. 12, *infra*.

[15] In *Dothard* the Court declared that an issue which had not raised in the District Court "is not before us" (433 U.S. at 323, n.1). The appeal there was not dismissed because other issues, properly raised below, were presented. Here, however, appellants raise only the single question whether the District Court was required to postpone the election, so that nothing remains of their appeal if that issue is rejected as untimely.

contrary (Jur. St. at 7), exigent circumstances exist that fully justified the District Court's refusal to modify the interim plan.[16]

These exigent circumstances are as obvious as the dates on the calendar. When the Attorney General objected to Act 82-629 on August 2, only five weeks remained before the primary. The filing deadline for candidates had already passed, and campaigning had already begun. As a practical matter, the District Court simply could not complete the herculean task of asking the parties to propose new plans, evaluating those plans, choosing among them, and deciding upon an election schedule in time for elections to go forward as planned.[17] Thus, the District Court faced a choice between (1) al-

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[16] Insofar as appellants contest the validity of the June 21 order, *see* Jur. St. at 10-12, their argument is foreclosed by this Court's recent decision in *Upham* v. *Seamon*, —— U.S. ——, 102 S. Ct. 1518 (April 1, 1982). In *Upham*, the District Court fashioned an interim plan for Texas' congressional districts that redrew not only two districts in South Texas to which the Attorney General had objected but also four other districts in Dallas County which he had precleared. This Court reversed, holding that the District Court should have modified only those districts to which the Attorney General had actually objected. 102 S. Ct. at 1522. In accordance with *Upham*, the District Court in its June 21 order properly deferred to the State Legislature's judgment insofar as it implemented Act 82-629 as the interim plan. If the entry of an objection to part of a plan falls short of endowing a district court with authority to disregard aspects of such plan which were not objected to, it follows *a fortiori* that, as of June 21, the District Court in this case had no authority to reject the State's plan, since, at that time, *no* objection had been interposed. *United States* v. *Board of Supervisors*, 429 U.S. 642, offers no support to appellants' position, since it stands only for the proposition that, in a suit to enforce compliance with Section 5, a district court does not have the authority to address the merits of a reapportionment plan.

[17] Of course, if this Court should vacate the District Court's order, the District Court would be obliged not only to choose a new plan and develop a new election schedule but also to direct new primary and runoff elections.

lowing elections to go forward as scheduled using a plan that contained 98 House districts (out of a total of 105) which had obtained the statutory preclearance; (2) allowing elections to go forward based on one of appellants' plans which had been disapproved for reasons whose validity is not questioned here; and (3) permitting incumbent legislators to continue serving in grossly malapportioned and hence unconstitutional districts pending implementation of a new interim plan (an alternative urged by neither party in August 1982). The District Court quite properly chose the first alternative.

In short, it cannot be gainsaid that exigent circumstances existed at the time of August 10 order. Indeed, the District Court found as early as June 21 that exigent circumstances existed. Appendix A at A-8. ("Because of severe time restraints, . . . this Court has a choice of implementing on an interim basis the legislative plan which has been evolving over months or plaintiffs' Plan B which has not been adequately studied or evaluated other than by plaintiffs.") As stated by Judge Johnson in his concurring opinion, "[T]he election deadlines continue their inexorable approach and an interim plan must be implemented." *Id.* at A-13. In denying appellants' Motion to Alter or Amend on June 28, the District Court stated that, in implementing an interim plan, it "did what all parties agreed last week was necessary—entered a final decision in order to allow the elections to proceed." Appendix B at A-29. *See also, id.* at A-28. On June 28, the District Court unanimously and unequivocally rejected appellants' suggestion, made "[b]elatedly and inconsistently," that elections be postponed until a new plan could be developed. Appendix B at A-29.

> This suggestion if implemented, would have the effect of encouraging legislators to procrastinate with constitutional redistricting requirements since they would remain in office until the new elections could be held after the process of redistricting had been completed. [Appendix B at A-29].

Given the severe time constraints imposed by the imminent elections and the District Court's explicit findings regarding these exigencies, one cannot deny that the District Court acted properly on August 10 in refusing to modify its interim plan. Only last Term this Court observed that

> [w]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations. [*Upham* v. *Seamon*, *supra*, 102 S. Ct. at 1522 (citations omitted)].

This statement reaffirmed the authority of the district courts declared in *Reynolds* v. *Sims*, 377 U.S. 533, 585:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexity of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

In *Reynolds*, this Court held that the District Court (the same District Court whose actions are challenged in the present case) "acted in a most proper and commendable manner," 377 U.S. at 586, in implementing a temporary reapportionment plan for purposes of the 1962 legis-

lative elections using parts of two proposed plans which violated the constitutional requirement of one-person, one-vote. This Court noted that the interim relief ordered by the District Court permitted elections to be held without great difficulty and without usurping the legislature's responsibility for reapportionment. *Id.*[18]

If, as the decisions of this Court establish, a district court may permit impending elections to be held under an *unconstitutional* reapportionment plan when the exigencies of time so require, it follows that a district court may permit elections to be held under an interim plan that does not meet statutory requirements, including those set forth in the Voting Rights Act of 1965. This conclusion is buttressed by *Georgia* v. *United States*, 411 U.S. 526. In that case the District Court enjoined the State of Georgia from holding elections for its House of Representatives under a plan to which the Attorney General had interposed an objection. This Court stayed the injunction and permitted elections to be held under the State's apportionment, notwithstanding the objection. 411 U.S. at 528. When the State appealed on the merits, this Court affirmed the injunction, but refused to set aside the elections held pursuant to the unprecleared plan. *Id.* at 541 ("Since . . . elections were conducted under the disputed 1972 plan by reason of this Court's stay order, it would be inequitable to require new elections at this time.") *See also Perkins* v. *Matthews*, 400 U.S. 379, 396-97 (refusing to order new elections even though elections had been conducted pursuant to an unprecleared plan).

In *Terrazas* v. *Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), a three-judge court hearing challenges to Texas'

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[18] *See also, Wells* v. *Rockefeller*, 394 U.S. 542, 547 ("[s]ince the 1968 primary election was only three months away . . ., we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities."); *Kilgarlin* v. *Hill*, 386 U.S. 120 (District Court properly allowed elections to go forward notwithstanding unconstitutional population variances in plan).

state legislative redistricting plan read *Georgia* and *Perkins* as holding that

> the grant of equitable temporary relief by [a district court] through the use of districts that are the subject of Section 5 objections is not per se contrary to the prohibitions of Section 5. As emphasized in *Georgia*, it is equitable considerations which determine what *temporary* plan should be utilized. [537 F. Supp. at 539.] [19]

Citing cases in which this Court had permitted elections to proceed using malapportioned districts in light of exigent circumstances, the *Terrazas* court held that

> the same principle should be applicable to a plan as to which a Section 5 objection has been raised: in emergencies, a court should be permitted to proceed on the basis of such a plan or portions of such a plan if that is the only fair and equitable alternative to disruption of the election process. [*Id.* at 538].

Applying this principle, the *Terrazas* court ordered into effect an interim plan that included districts to which the Attorney General had objected, on the grounds that otherwise the primary (which was two months away at the time of the decision) would be disrupted. *Id.* at 539.

In light of the exigencies imposed by the election schedule, the District Court in this case acted properly in refusing to alter the interim reapportionment plan when the Attorney General interposed an objection to Act 82-629 only five weeks before the primary. The decisions of this Court on which appellants rely are not to the contrary. *Hathorn* v. *Lovorn*, —— U.S. ——, 102 S. Ct. 2421 (June 15, 1982) (Jur. St. at 11), does not purport to restrict the authority of federal district courts to order into effect temporary reapportionment plans when exigent circumstances so require. *Hathorn* held that state

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[19] The United States District Court for the District of Columbia has likewise so interpreted this Court's decisions in *Georgia* and *Perkins*. See p. 17, *infra*.

courts have the duty to determine whether Section 5 applies in a given case and "must . . . refrain from ordering relief that would violate federal law." 102 S. Ct. at 2430 (note omitted). But the issue here is whether the District Court's order allowing the election to be held is "relief that would violate federal law" (*Id.*). Hathorn reaffirms that such relief does not violate federal law. Noting that the "United States has initiated a federal suit challenging the change [in election law] at issue here," 102 S. Ct. at 2430, the *Hathorn* opinion went on to state that

> [a]s we noted in Perkins v. Matthews, 400 U.S. 379, 395-97 (1971), a local District Court is in a better position than this Court to fashion relief, because the District Court "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence. *Id.*, at 397. In this case, the District Court for the Northern District of Mississippi will be better able to decide whether a special election is necessary, whether a more moderate form of interim relief will satisfy § 5, *or whether new elections are so imminent that special relief is inappropriate.* [*Id.* at 2430-31 (note omitted) (emphasis added)].

In the instant case, the District Court held, in light of its familiarity with the exigencies of the local situation in Alabama, that the 1982 state legislative elections should proceed on the basis of an interim plan and that special relief was inappropriate. The District Court also directed the State to obtain preclearance by March 1, 1983 and stated that a special election would be held no later than the fall of 1983. These holdings are wholly in accord with the District Court's remedial power as recognized in *Hathorn*.

Moreover, the decision of the District Court in this case does not conflict with *Busbee* v. *Smith*, No. 82-0665 (D.D.C. May 24, 1982), on which appellants especially rely (Jur. St. at 11). The Court in *Busbee* did not decide that a District Court is required to postpone an

election if the Attorney General has interposed an objection to the statute pursuant to which that election is to be held. On the contrary, the District of Columbia Court, citing *Georgia* and *Perkins*, *supra*, has stated, "[t]he Supreme Court has recognized the equitable power of the District Courts to permit enforcement of such [apportionment] statutes *pendente lite* notwithstanding Section 5." *Horry County* v. *United States*, 449 F. Supp. 990, 996 (D.D.C. 1978).[20] What the Court did decide in *Busbee* was that under the circumstances of that case the holding of the election after the Attorney General's objection would be improper. But the circumstances in *Busbee* are entirely different from those which prompted the District Court in this case to allow the election to proceed as scheduled.

In *Busbee*, the Attorney General objected in May 1982 to Georgia's congressional redistricting plan. Unlike Alabama, Georgia made no effort to revise the plan in response to his objection, but instead brought a declaratory judgment action under Section 5 and began to implement the plan on an interim basis pending resolution of that action. In effect, Georgia treated its own action as granting it an automatic stay of the Attorney General's disapproval. In addition, Georgia engaged in numerous delaying tactics.[21] The time sequence in *Busbee* also differs critically from that in this case. In *Busbee*, the Attorney

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[20] *Accord*, *Charlton County Board of Education* v. *United States*, 459 F. Supp. 530, 536 (D.D.C. 1978) (declining to enjoin primary, in part on grounds that injunction "would engender confusion among the electorate and hamper the election officials' task of conducting the primary for other county offices in an orderly and efficient manner").

[21] Appellants also imply that, here, as in *Busbee*, the State sought to delay resolution of the Section 5 issue long enough to plead that exigent circumstances required use of the State's plan for the 1982 election (Jur. St. at 3, 11). Here, Alabama responded promptly to the Attorney General's May 6 objection to Act 81-1049 and complied with the District Court's order to submit a proposed interim plan by June 8. See note 4, *supra*.

General objected *before* the election process had begun. In the instant case, on the other hand, the Attorney General objected only five weeks before the primary, *after* the filing deadline for candidates had passed and *after* campaigning had begun.

Thus, in the present case, the District Court properly exercised its remedial authority in implementing Act 82-629 (as modified) as an interim plan and in refusing to modify it after the Attorney General objected to Act 82-629 on August 2. By ordering the State to pass a new plan and obtain preclearance by March 1, 1983, the District Court recognized that preclearance is a prerequisite for any *permanent* redistricting plan, unless that plan is fashioned by the court. *Connor* v. *Johnson*, 402 U.S. 690. At the same time, the District Court correctly recognized in its June 21 order that the Attorney General "has not acted in time for the elections to proceed in accordance with any decision he renders." Appendix B at A-28. Accordingly, the District Court "did what all parties agreed . . . was necessary," by implementing a *temporary* plan "in order to allow the elections to proceed." *Id.* at A-29.[22] In using Act 82-629 as the interim plan, the District Court properly deferred to the State's redistricting policies. *Upham* v. *Seamon*, *supra*. When the Attorney General actually interposed an objection to Act 82-629 only five weeks before the primary, the District Court properly refused, in light of exigent circumstances, to modify the interim plan.

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[22] The fact that the District Court's plan is a temporary one distinguishes this case from *McDaniel* v. *Sanchez*, 452 U.S. 130, in which this Court held that preclearance was required for implementation of a permanent plan developed by the State in response to a court order declaring the existing plan unconstitutional. *See Terrazas* v. *Clements*, *supra*, 537 F. Supp. at 539; *Seamon* v. *Upham*, 536 F. Supp. 931, 939 n.7 (E.D. Tex.), *rev'd on other grounds*, 102 S. Ct. 1518 (April 1, 1982).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No. 81-617-N

WILLIAM L. BURTON, PERCY D. BELL, ABRAHAM LINCOLN WOODS, JR., BOBBY JO JOHNSON, ANDREW HAYDEN, FELIX NIXON, EURALEE A. HAYNES, individually and on behalf of all other persons similarly situated,

Plaintiffs

vs.

WALKER HOBBIE, JR., in his official capacity as Judge of Probate of Montgomery County and as a representative of the class of all judges of probate in the State of Alabama; DON SIEGELMAN, in his official capacity as Secretary of State of Alabama,

Defendants

CHARLES A. GRADDICK, Attorney General for the State of Alabama,

Defendant-Intervenor

[Filed Aug. 27, 1982]

Before FRANK M. JOHNSON, JR., Circuit Judge, HOBBS and THOMPSON, District Judges.

TRUMAN M. HOBBS, District Judge

MEMORANDUM OPINION

This cause is now before the Court on defendants' motion, filed herein August 13, 1982, to reconsider the Court's August 10, 1982 order which set a February 1, 1983 deadline for the submission of a legislative plan approved by the Attorney General of the United States.

Also before the Court are plaintiffs' motion, filed August 16, 1982, to stay the Court's order of August 10, refusing to vacate or modify the interim plan; and plaintiffs' motion, filed August 25, 1982, for reconsideration of this Court's orders of June 21 and August 10, adopting an interim plan and setting a February 1, 1983 date for submission of a third approved legislative plan. A hearing was held on the above motions on August 25, 1982. Upon consideration of the motions and the arguments presented, the Court is of the opinion that defendants' motion for reconsideration is due to be granted in part, and plaintiffs' motions for a stay and reconsideration are due to be denied.

In its opinion of June 21, 1982, the Court stated that if the Alabama Legislature failed to obtain Section 5 approval for Act No. 82-629 from the United States Attorney General or the United States District Court for the District of Columbia and failed "at its next session of the Legislature to adopt a redistricting plan which will be approved . . . this Court will formulate a court redistricting plan." The Court went on to state in its accompanying order that in no event would its interim redistricting plan be valid for any election after December 31, 1983. The parties acknowledged at the August 25, 1982 hearing that they understood the Court's June 21 order to require an election for new legislators under a permanent plan no later than the fall of 1983, which would clearly foreclose the Legislature from waiting until its April 1983 regular session to consider a third reapportionment plan. In order to have any hope of meeting the deadline of fall 1983 elections, the Legislature will have to pass a new plan in the fall of 1982 or the winter of 1983.

In their motion defendants argue that there are severe practical and political impediments to the Alabama Legislature passing and obtaining preclearance for a legislative plan on or before February 1, 1983, as required by

the order of this Court. In their August 13, 1982 submission, defendants argued that they would need until June 1, 1983; however, in court defendants asserted that they could comply with a February 15, 1983 deadline for passage of a reapportionment plan and an April 15-30, 1983 deadline for approval from the Attorney General. Although the Court is aware of the problems the Legislature will meet in facing a winter 1983 deadline, the Court is concerned about the amount of time that it will require for this Court to devise a reapportionment plan which meets all the legal requirements. All parties understand that elections for a new legislature under a permanent reapportionment plan should be held no later than the fall of 1983. In order to meet this schedule, the Court concludes that it cannot delay beyond March 1, 1983 to begin devising its own plan.

This Court, accordingly, will extend the deadline for submission of an approved plan from February 1 to March 1, 1983. The Court is not acting to circumscribe the efforts of the Legislature. But in order to devise its own plan, if the Legislature is unsuccessful in getting a valid plan, the Court will require time for extensive study of the relevant materials and documents by a court-appointed expert and by the members of this Court, time for public comment on the plan devised, time for comment and challenges to the plan by the parties, and finally, time to review all comments and incorporate all necessary changes. This is a process which will take more than a few weeks. Defendants have consistently noted that State election officials need approximately three months' lead time to put a plan in place for an election. The Court does not want to find itself in the position it faced in June of 1982 when the time requirements for putting an election plan in place foreclosed careful consideration of submitted plans or the development of a court plan. The Court would remind the defendants that, by their own admission, it took the Alabama Legislature from early April 1981 (when it received the census data)

to October 21, 1981, to devise and pass its first redistricting plan, a period of seven months.

Moreover, even if the Alabama Legislature succeeds in passing and obtaining approval for a new reapportionment plan by March 1, 1983, this Court will still need to hold hearings on any state and federal constitutional objections plaintiffs may raise. These challenges could require the Court to devise its own plan even if the legislative plan was precleared by the Attorney General. For the above reasons, the Court will order that defendants file with this Court by March 1, 1983, an approved legislative redistricting plan or otherwise this Court must proceed to devise its own redistricting plan.

The Court has said several times that it is of the opinion that the elections scheduled for the fall of 1982 should be held as scheduled under the interim plan set out in the Court's June 21, 1982 order. The Court is still of that opinion and will not stay its June 21 and August 10, 1982 orders, adopting and refusing to modify said interim plan. Furthermore, the Court will not delay the elections in order to have the current Legislature act on a new plan this fall nor proceed to hold hearings on the state and federal constitutional issues and devise a court plan prior to March 1, 1983 as requested in plaintiffs' motion for reconsideration. The effect of what plaintiffs are seeking would be to reward the members of the Legislature, who have twice failed in their efforts to devise a plan which would meet Section 5 approval, by allowing them to remain in office for another six months. This Court is unwilling to take such a step which would encourage legislative procrastination. Plaintiffs' motion for a stay and for reconsideration will be denied.

Finally, the Court is of the opinion that whether on March 2, 1983, the Court must begin to devise its own plan or initiate consideration of an approved legislative plan, it will be necessary for the Court to have all census and other data which the parties believe are relevant and

necessary to enable the Court's expert to devise a reapportionment plan. The parties have stated in prior hearings that it could require two weeks or more to gather and file all the necessary data with the Court. Because the Court thinks that further delay beyond March 1, 1983, is unwarranted, the Court will order the parties to file all necessary data on or before March 1, 1983. Moreover, in order that the Court may proceed in choosing its own expert without prejudice to the parties, it will direct the parties to file with the Court a list of all experts they have contacted or intend to contact in connection with this litigation.

An order will be entered in accordance with this memorandum opinion issued this date.

DONE this 27th day of August, 1982.

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

/s/ Truman M. Hobbs
United States District Judge

/s/ Myron H. Thompson
United States District Judge

THOMPSON, District Judge, concurring specially.

I adhere to my opinion, as expressed in my earlier dissents, that the court acted improperly in adopting and in subsequently refusing to amend a legislative reapportionment plan to which the Attorney General had objected pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Nevertheless, I concur in the denial of both the plaintiffs' motion to stay and motion to reconsider only because I am of the opinion that it is now time to focus on obtaining a valid permanent reapportionment plan for the fall 1983 elections of the Alabama legislature.

DONE, this the 27th day of August, 1982.

/s/ Myron H. Thompson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 81-617-N

WILLIAM L. BURTON, *et al.*,
Plaintiffs

vs.

WALKER HOBBIE, JR., ETC., *et al.*,
Defendants

CHARLES A. GRADDICK, Attorney General
for the State of Alabama,
Defendant-Intervenor

[Filed Aug. 27, 1982]

ORDER

In accordance with the memorandum opinion entered this date, it is

ORDERED that defendants' August 13, 1982 motion to reconsider this Court's order of August 10, 1982 be and hereby is granted.

It is further ORDERED that the defendants in this action file with this Court by March 1, 1983, an approved legislative redistricting plan which has met the preclearance requirements of Section 5 of the Voting Rights Act, by means of approval either by the United States Attorney General or by the United States District Court for the District of Columbia; otherwise, the Court will proceed to draw a permanent court-ordered plan for the reapportionment of the Alabama Legislature.

It is further ORDERED that plaintiffs' August 16, 1982 motion to stay this Court's August 10 and June 21,

1982 orders and plaintiffs' August 25, 1982 motion to reconsider this Court's orders be and hereby are denied.

It is further ORDERED that all parties to this litigation file with the Court on or before March 1, 1983, all data which the parties consider the Court's expert will need in order to devise a constitutionally valid reapportionment plan. The parties are also DIRECTED to file with the Court a list of all experts they have contacted or intend to contact in connection with this litigation by September 30, 1982.

DONE this 27th day of August, 1982.

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

/s/ Truman M. Hobbs
United States District Judge

/s/ Myron H. Thompson
United States District Judge

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-360

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM L. BURTON, et al.,
Appellants,

vs.

WALKER HOBBIE, JR., etc., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama Northern Division
(three-judge panel)

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White v. Dougherty County Bd. of Education, 431 F.Supp. 919 (M.D. Ga. 1977), *aff'd*, 439 U.S. 32 (1978) ____ 4-5
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No. 82-360

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM L. BURTON, et al.,
Appellants,

vs.

WALKER HOBBIE, JR., etc., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama Northern Division
(three-judge panel)

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants William L. Burton, et al., respectfully pray that this Court will deny the Appellees' motion to dismiss or affirm and that it will note probable jurisdiction in this appeal.

THIS COURT SHOULD NOTE PROBABLE JURISDICTION IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE LOWER COURTS REGARDING THEIR JURISDICTION AND DISCRETION TO AUTHORIZE IMPLEMENTATION OF ELECTION PLANS THAT VIOLATE SECTION 5 OF THE VOTING RIGHTS ACT

Appellees correctly point out that since the drafting and submission of the Jurisdictional Statement, primary elections for the Alabama Legislature have been concluded and the District

Court has indicated its intention to order special legislative elections in the Fall of 1983 under a new reapportionment plan. Motion to Dismiss or Affirm at 8 and n.12. Only 13 of the 35 Democratic Senate nominees face Republican opposition in the November 2, 1982, general election, and only 30 of the 105 Democratic nominees for House Seats have opposition. Three black Senate candidates prevailed in the Democratic primaries, one of whom has Republican opposition in November, and seventeen black candidates for House Seats won in the primaries, only one of whom faces opposition in the general election. If neither of the black candidates is defeated in the general election, under the interim reapportionment plan approved by the District Court blacks will have realized a gain of four seats in the House of Representatives but no gain or loss of seats in the Senate.[1]

Under these circumstances, the posture of this appeal is more in the nature of a challenge to elections already held than it is a petition to enjoin impending elections. This Court's refusal to stay the District Court's interim plan and to postpone the primary elections has substantially changed the equities governing appropriate relief in the event Appellants are successful in this appeal. Appellants still pray that this Court will vacate the District Court's interim plan order and remand the case for the purpose of implementing as soon as practicable a plan which does not adopt parts of the State's plan to which the Attorney General has objected. However, Appellants do not now seek a stay of the November 2, 1982, general election, which at this point is largely a mere formality. Appellants believe that it will be inconsistent with their responsibilities as representatives of the class of black voters in Alabama for them to seek status quo relief from this Court which, at least numerically, reduces the degree of black representation in the House of Representatives.

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[1]House District 90 and Senate District 29, which were the focus of the Attorney General's objection to the reapportionment scheme for the Black Belt, returned their white incumbents in the primaries.

These intervening events and the withdrawal of Appellants' prayer for a stay do not, however, render the issues in this appeal moot. The challenged interim court-ordered reapportionment plan remains in effect, and remedial elections sooner than the unspecified date in the Fall of 1983 may be practicable and warranted.

Even if this Court were to determine that remedial elections ought not be scheduled any sooner than Fall 1983, it should note probable jurisdiction in this appeal on the ground that the issues presented are "capable of repetition yet evading review". *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). In relevant respects, the instant case is indistinguishable from *Moore v. Ogilvie*, 394 U.S. 814 (1969), where the petitioners sought to be certified as candidates in an election that had already been held. *Moore v. Ogilvie* is one of the chief authorities relied on in *Sosna, supra*, 419 U.S. at 399. Whether and under what circumstances a federal district court may authorize state authorities to implement even temporarily voting changes that have not been precleared under Section 5 are questions which have already confronted several courts and are bound to recur with frequency, particularly in reapportionment cases. These are sensitive questions involving both the relationship between the federal judiciary and state and local governments and the propriety of federal court action that frustrates or interferes with statutory voting remedies established by the Congress under the fourteenth and fifteenth amendments. This Court should afford plenary consideration to these issues and resolve what one lower court has called "confusion in the case law about the precise remedy to be accorded to plaintiffs in a case of this nature." *Heggins v. City of Dallas*, 469 F.Supp. 739, 742 (N.D. Tex. 1979).

There is a sharp division among the lower federal courts concerning the extent of their equitable discretion to permit state or local authorities to go forward with unprecleared election schemes on a temporary basis. Under varying circumstances, a number of courts have enjoined the conduct of impending elections where voting changes have been objected to

or otherwise have not been precleared under Section 5. *Busbee v. Smith*, ___ F.Supp. ___ (D. D.C. May 24, 1982) (State of Georgia enjoined from conducting congressional elections under redistricting plan objected to by the Attorney General); *Herron v. Koch*, 523 F.Supp. 167 (S.D. N.Y. 1981) (City of New York enjoined from conducting primary elections where redistricting plan had been submitted to the Attorney General, who had not yet objected); *United States v. Board of Commissioners of Colleton County*, 509 F.Supp. 1329 (D. S.C. 1981) (further elections under unsubmitted at-large election plan for county council enjoined); *Coalition to Preserve Houston v. Interim Board of Trustees of the Westheimer Independent School District*, 494 F.Supp. 738 (S.D. Tex. 1980), *appeal dismissed*, 101 S.Ct. 1335 (1981) (local elections held in defiance of Attorney General's Section 5 objection voided as "legally unenforceable"); *Heggins v. City of Dallas*, 469 F.Supp. 739 (N.D. Tex. 1979) (city elections enjoined where city's declaratory judgment action was still pending in the D. C. district court and the districting plan had not yet been precleared), *citing Matthews v. LeFlore County Board of Election Comm'rs*, 450 F.Supp. 755 (N.D. Miss. 1978); *Horry County v. United States*, 449 F.Supp. 990 (D. D.C. 1978); *White v. Dougherty County Bd. of Education*, 431 F.Supp. 919 (M.D. Ga. 1977), *aff'd*, 439 U.S. 32 (1978); *Pitts v. Carter*, 380 F.Supp. 4 (N.D. Ga. 1974); *Beer v. United States*, 374 F.Supp. 357 (D. D.C. 1974).

Other courts have either failed to enjoin or refused to enjoin elections despite the absence of Section 5 preclearance. *Terrazas v. Clements*, 537 F.Supp. 514 (N.D. Tex. 1982) (some legislative districts objected to by the Attorney General included in temporary court-ordered plan); *Charlton County Bd. of Education v. United States*, 459 F.Supp. 530 (D. D.C. 1978) (primary elections authorized under plan objected to by Attorney General on grounds that district court lacked personal jurisdiction over authorities responsible for elections and that primary elections would not finally determine the candidates elected); *United States v. Hale County Commission*, 425 F.Supp. 433 (S.D. Ala. 1976), *aff'd*, 430 U.S. 924 (1977); *Moore v. LeFlore*

County Bd. of Election Comm'rs, 351 F.Supp. 848 (N.D. Miss. 1971); *Wilson v. North Carolina State Bd. of Elections*, 317 F.Supp. 1299 (M.D. N.C. 1970).

As Appellees point out, Motion to Dismiss or Affirm at 17, there is dictum in one decision of the District Court for the District of Columbia interpreting this Court's decisions in *Georgia v. United States*, 411 U.S. 526, 541 (1973), and *Perkins v. Matthews*, 400 U.S. 379, 389-97 (1971), as recognizing the equitable power of federal district courts to permit enforcement of election law changes *pendente lite* notwithstanding their lack of preclearance under Section 5. *Horry County v. United States, supra*, 449 F.Supp. at 996. In fact, neither of these decisions squarely addresses the proposition cited, and both are readily distinguished by the presence of serious questions about the applicability of Section 5 to the voting changes involved. *See Berry v. Doles*, 438 U.S. 190, 194 (1978) (J. Brennan concurring). Other decisions of this Court imply that, where Section 5 coverage is undisputed, federal courts have "no alternative" but to stay or enjoin impending elections under an unprecleared plan. *Holt v. City of Richmond*, 406 U.S. 903 (1972) (C. J. Burger concurring); *Canady v. Lumberton City Bd. of Education*, 102 S.Ct. 494 (1981) (stay granted to prohibit the implementation of an objected-to annexation); *Dougherty County Bd. of Education v. White, supra* (district court's injunction of an unprecleared voting change affirmed).

The specific exercise of jurisdictional authority and/or discretion at issue in the instant case has never been addressed squarely by this Court.

> No judicial decision addresses the use of a partially unprecleared plan as a temporary, emergency court-ordered plan. The question of the use of unprecleared plans has arisen in the context of whether a legislative plan must initially be submitted for preclearance, e.g., *McDaniel v. Sanchez*, [452 U.S. 130 (1981)]; *Berry v. Doles*, 438 U.S. 190 (1978), not in the context of whether portions of a plan which have been submitted for preclearance and have been objected to can be temporarily utilized upon a dis-

trict court's finding that parts of the objected-to plan are the most equitable under the circumstances.

Terrazas v. Clements, supra, 537 F.Supp. at 539.

This Court should decide whether district courts have the statutory authority *per se* to authorize in any manner the implementation of election changes which have not been precleared either by the Attorney General or by the District Court for the District of Columbia. At the very least, it may be argued that only the District Court for the District of Columbia has the jurisdictional authority to permit temporary implementation of an unprecleared plan *pendente lite. See McDaniel v. Sanchez, supra,* 452 U.S. at 151; *United States v. Board of Supervisors of Warren County,* 429 U.S. 652 (1977). Thus limiting the authority of local district courts would prevent the occurrence of anomalous situations, like the instant one, where state authorities, who otherwise would be forced to file a declaratory judgment action in the District of Columbia prior to implementing an objected-to voting change, may take advantage of a pending private action filed in the local district court to circumvent the explicit enforcement scheme of Section 5.

Even if this Court should conclude that local district courts, as a matter of raw power, may authorize temporarily the enforcement of unprecleared election plans, it should provide clear guidance for the proper exercise of equitable discretion in such cases. The lower court decisions vary substantially with respect to what principles should govern their discretion. For example, the district court in the instant case believed that the objectives of the Voting Rights Act would better be served by allowing impending elections to go forward in spite of the Attorney General's objection, with interim elections to follow a year later. Jurisdictional Statement at A-28-29.[2] The court in

[2]Appellees incorrectly assert that Plaintiffs-Appellants never argued to the District Court that the elections should be postponed if their plans were rejected. Motion to Dismiss or Affirm at 9-10. Plaintiffs' two motions to alter or amend urged postponement of the elections as a last resort. In fact, the District Court's order of June 28, 1982, squarely addressed and rejected this suggestion. Jurisdictional Statement at A-29, para. (5).

Herron v. Koch, 535 F.Supp. at 175, took the opposite position, believing that to allow the city to go forward with planned elections without Section 5 preclearance "would effectively nullify the intended thrust of the section." *Accord, Heggins v. City of Dallas, supra*, 469 F.Supp. at 742 ("it seems to us imminently more equitable to all concerned to delay the election rather than to allow an election in direct contravention of the Voting Rights Act"). The majority in *Heggins v. City of Dallas, supra*, 469 F.Supp. at 742, concluded that the choice of whether or not to enjoin elections under unprecleared plans should be controlled, among competing equitable considerations, by the timing of the plaintiffs' claim. Dissenting, Judge Hill disagreed, urging instead the weighing of factors such as the potential prejudice to the voting rights of racial minorities and the extent to which the State or local government had unduly delayed seeking Section 5 preclearance. *Id.* at 746-47.

Clarification of these issues is badly needed. The confusion of priorities in the provision of judicial relief for Section 5 violations leaves lawmakers, voters and courts alike in a state of uncertainty about the proper course of action to be taken, particularly in the legislative reapportionment process. This defeats the congressional purpose of the Voting Rights Act, which was designed to provide certainty regarding when voting changes may be implemented in covered jurisdictions.

CONCLUSION

For the aforegoing reasons, Plaintiffs-Appellants pray that the Court will note probable jurisdiction in this appeal, and, following plenary review, that it will vacate the interim election order of the District Court and remand the case with instructions that new remedial elections, fully complying with Section 5, be conducted at the earliest practicable opportunity.

Respectfully submitted,

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